Supreme Court, U.S.
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NO. 01-1711

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex. rel. ANTHONY J. DUNLEAVY,
Petitioner

v.

THE COUNTY OF DELAWARE; MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIR; MATTHEW HAYES, JR., ADMINISTRATOR FOR THE ESTATE FOR THE ESTATE OF MATTHEW J. HAYES;
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a municipal corporation included within the definition of the term "person" under the False Claims Act, 31 U.S.C. §3729(a), and therefore a proper defendant under that Act?

2. May an employee of a municipal corporation, sued in his individual capacity, be liable under the Act regardless whether there are allegations that he derived a personal financial benefit from the alleged violation of the False Claims Act?

PARTIES TO THE ACTION BELOW

Appellant/Plaintiff: United States of America, ex rel. Anthony J. Dunleavy. Mr. Dunleavy was the Appellant in this matter. Mr. Dunleavy is an individual, with no corporate affiliates involved in this matter.

Appellees/Defendants: The County of Delaware, Marianne Grace, Executive Director; the Council of the County of Delaware, Wallace H. Nunn, Chairman; and Matthew J. Hayes, Jr. as Administrator of the Estate of Matthew J. Hayes.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 279 F.3d 219 and reprinted as Appendix A1. The opinion of the District Court is unpublished and is reprinted as Appendix A17.

JURISDICTION

The judgment below was entered on January 29, 2002. Rehearing was denied on February 22, 2002. (A43). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE IN QUESTION

The False Claims Act, 31 U.S.C. §3729, et seq. is set forth in Appendix A46.

STATEMENT OF THE CASE

This case presents two important questions bearing on the application of the False Claims Act ("FCA"), to counties and other units of local government. First, is a municipal corporation included within the definition of the term "person" under the False Claims Act, 31 U.S.C. §3729(a), and therefore a proper defendant under that Act? The court below held "no," thereby creating a stark circuit conflict and gutting the ability of the United States to redress frauds on the Treasury perpetrated by cities and counties. Given that units of local government receive billions of dollars of federal appropriations every year, this

is a devastating blow to the utility of the FCA in policing fraud on the Federal Government.

The second question presented is whether an employee of a municipal corporation, sued in his individual capacity, can be liable under the False Claims Act regardless of whether there are allegations that he derived a personal financial benefit from the alleged violation of the False Claims Act. The court below held that an individual cannot be so liable, despite the fact that the statute itself, which focuses on the harm to the public fisc rather than the benefit to the accused fraudster, imposes no such requirement of personal financial gain. Without citation to any authority, the court below thus rewrote the False Claims Act to add a requirement Congress itself did not impose.

The facts of the underlying FCA claim are simple and in any event have little bearing on the two uncluttered issues of law presented here. In 1976, Delaware County condemned and purchased 56 acres of land, known as the Penza Tract, using $1.8 million in Department of Housing and Urban Development ("HUD") Community Development Block Grant funds. In 1980 and 1981, the County sold some of this land to the Pennsylvania Department of Transportation ("PennDOT") for construction of a highway (known locally as the "Blue Route"). The County received approximately $2.1 million for these parcels. In 1988, PennDOT paid the County $1 million for additional land, some of which was from the Penza Tract.

Delaware County retained the right to repurchase the lands sold to PennDOT, in the event that the Blue Route was never completed. Because construction of the highway suffered many delays and in order to insure its ability to repurchase the land, the Council, in consultation with Mr. Dunleavy, a private consultant retained by the County to consult on HUD matters, ordered that the funds received from PennDOT be placed into an interest-bearing escrow account, to remain untouched until the Blue Route contingencies resolved. The Council informed its Executive Director, Matthew J. Hayes, of this decision. The Council was aware that the Penza Tract funds (both principal and interest) would have to be returned to HUD if the highway opened. [1]

In keeping with the Council's resolution, Hayes created an interest-bearing escrow account called the Penza Tract Fund. But in violation of the Council's specific directive, Hayes personally authorized annual withdrawals from the Fund from 1980 to 1992.[2] In

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1. HUD provides block grants to communities which may only be used for purposes considered both eligible and fundable, as those terms are defined by regulations. *See* 42 U.S.C. §5301 et seq.; 24 C.F.R. §570.500 et seq. HUD regulations define monies received from the sale of an asset purchased with HUD funds as "program income," and govern the use and return of these monies. *See, e.g.*, 24 C.F.R. §570.500(a); §570.504(a); §570.504(b)(2)(iii); OMB Circular A102.

2. An uncontroverted expert report in the district court determined that, as of January, 1992, the Penza Tract fund should have contained over $5 million, but actually contained approximately $2 million.

December, 1991, the Blue Route opened, triggering the County's legal obligation to return the principal and interest on the Fund to HUD. In February, 1992, Dunleavy's consulting contracts with the County were terminated. After 1991, Delaware County failed to report to HUD in its yearly accountings, and other HUD documents, the existence of the Penza Tract Fund, and failed to return the Fund, principal and interest, to the Federal government.

1. Proceedings Below

On November 18, 1994, Mr. Dunleavy commenced this lawsuit. The district court exercised jurisdiction pursuant to 31 U.S.C. §3732(a). In August 1995, the federal government declined to intervene, noting that their investigation at that time did not reveal fraud. In March, 1996, HUD performed a Limited Review Audit of the Penza Tract Fund. In September, 1996, Delaware County resolved the Audit through the repayment to HUD of approximately $1.9 million. On July 12, 1996, the district court dismissed Mr. Dunleavy's complaint pursuant to the FCA's public disclosure bar, 31 U.S.C. §3730(e)(4) (A). The United States Court of Appeals for the Third Circuit reversed this decision and remanded the case to the trial court on August 22, 1997.[3] On November 5, 1998, the district court held that the Audit Resolution was not an "alternate remedy" within the meaning of the FCA. *See* A23, fn. 7.

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3. The Court's decision is published at 123 F.3d 734(3dCir.1997).

On October 12, 2000, the district court dismissed Mr. Dunleavy's case against Delaware County and its Council on the grounds that *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), effectively barred FCA claims against municipalities when it concluded that the FCA's treble damages are essentially punitive. The court also dismissed Mr. Dunleavy's case against Mr. Hayes in his individual capacity, finding that the Complaint lacked allegations that Mr. Hayes had acted for his own benefit. (A 41-2).

Mr. Dunleavy timely appealed to the United States Court of Appeals for the Third Circuit on November 2, 2000. The United States filed an *amicus curie* brief with the Third Circuit in support of Mr. Dunleavy, and appeared at oral argument. With respect to Delaware County, the Third Circuit held that counties are immune from any liability under the FCA because the statute's imposition of treble damages, which *Stevens* described as punitive, must mean that Congress meant to exempt cities from the FCA's reach. (A11-15). With respect to Mr. Hayes, the court held that individuals must personally profit in order to be defendants under the FCA. (A4).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PERPETUATES A SHARP CONFLICT AMONG THE COURTS OF APPEALS ON THE IMPORTANT QUESTION OF WHETHER CITIES AND COUNTIES ARE SUBJECT TO THE FALSE CLAIMS ACT.

The Third Circuit's ruling sharply conflicts with the decision of the United States Court of Appeals for the Seventh Circuit. In *U.S. ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7thCir.2002), the Seventh Circuit engaged in a careful and searching analysis of the text, history and structure of the FCA and concluded that local governments were persons as defined in the Act, and therefore proper defendants. This finding was based upon a conclusion that Congress did not intend to exempt municipalities from the reach of the FCA *sub silentio*. *Id.* at 979. A petition for writ of certiorari in that case is pending. (No. 01-1572).

The first Court of Appeals decision to address this issue was *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486 (5thCir. 2001), *cert. denied*, 122 S.Ct. 808, *rhg. denied*, 122 S.Ct. 1198 (2002). *Garibaldi*, like the court below, ruled that cities are absolutely immune from liability under the FCA due to municipalities' complete immunity from punitive damages. There was no circuit conflict when this Court denied review in *Garibaldi*, but there is now.

The conflict among the lower courts on this issue is only going to get worse because the issue inevitably arises

in every instance in which a city, county or other unit of local government is sued under the False Claims Act. Several district courts have held that local governments are subject to the FCA. *See United States ex rel. Rosales v. San Francisco Housing Auth.*, 173 F.Supp.2d 987 (N.D.Cal. 2001); *United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D.Cal. July 27, 2000); *United States ex rel. K & R Ltd. Partnership v. Mass. Housing Finance Agency*, 154 F.Supp.2d 19 (D.D.C. 2001). These district courts have accepted that Congress intended municipalities to be "persons," and that Congress intended all "persons" to be subject to the FCA's remedy, treble damages. Other district courts have ruled that municipalities are not liable under the FCA due to the treble damages being punitive damages. *See United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2001 U.S.Dist. LEXIS 10170 (D.Minn. Jan. 22, 2001); *United States ex rel. Honeywell v. San Francisco Hsg. Auth., et al.*, 2001 U.S. Dist.LEXIS 9743 (N.D.Cal. July 12, 2001); *United States ex rel. Satalich v. City of Los Angeles*, 160 F.Supp.2d 1092(C.D.Cal.2001); *United States ex rel. King v. Jackson County Hosp. Corp.*, 2001 U.S.Dist. LEXIS 21706 (N.D.Fla. Aug. 17, 2001).

The conflict on this issue in the lower courts threatens the Government's ability to protect the United States Treasury from frauds wrought by local governments entities. Federal funds distributed to state and local governments for such programs as low income housing, education and public safety exceed $200 billion annually. U.S. DEPARTMENT OF COMMERCE, PUBLICATION FES/96 at 46, Table 11 (1997). That level of funding creates enormous opportunity – and enormous temptation – for fraud by

counties, and the FCA is the weapon Congress has created to combat that fraud.

The practical importance of this issue has been multiplied by the events of the last year. One of the most important forms of direct federal assistance to cities and counties is disaster relief. The catastrophic attacks of September 11, 2001, have caused the need for disaster relief and public safety assistance to cities to skyrocket. In New York City alone, the federal government has provided billions of dollars in assistance since September 11. Local governments have also sought dramatic increases in federal funding to assist in airport security, increased police presence, and other safety issues. With this increased funding comes the need for increased oversight of federal spending. It is now more vital than ever that scarce fiscal resources be devoted to improving security and tending the wounds inflicted by our nation's enemies, rather than squandered through fraudulent claims.

The FCA is the strongest tool available to detect and deter fraud on the federal fisc, including fraud by counties and other local government entities. The importance to the FCA of policing fraud by such parties is underscored by the rapidly growing log of cases in which the question presented here has been litigated. *See supra* page 6-7. The gaping hole in FCA coverage torn by the decision below threatens not only *qui tam* actions initiated by private relators, but also FCA cases brought by the United States itself, since the ruling that cities cannot be sued under the FCA applies to both types of lawsuits. The Department of Justice has attested to the significance of

this issue by appearing as *amicus curiae* in support of relators, in every case that has reached a Court of Appeals, even in those cases in which the United States has not intervened. The United States has consistently argued to those courts that cities and counties are "persons" within the meaning of the FCA and that nothing in the text or history of the statute even hints that Congress intended to exempt cities from the treble damages liability imposed by the Act.

The city immunity rule announced below is also disrupting the Government's ability to bring its own FCA cases. For example, in *United States v. Hickman County, Tennessee*, No. 1:97-0086 (M.D.Tenn March 29, 2001), the district court dismissed the United States' claim on the ground that the county was immune from FCA liability. The allegations in the complaint reveal the depths to which counties, like other parties, will sometimes go to defraud the United States Treasury. The United States contends that Hickman County defrauded the Federal Emergency Management Agency ("FEMA") when the county submitted claims for the rebuilding of bridges that, the county claimed, had been destroyed by a flood. The Government has alleged that in fact the county sent out its bulldozers to knock down its own wooden bridges (which were still standing after the flood), in order to qualify for federal assistance in building new concrete bridges. An appeal, No. 01-5860, is currently being briefed before the Sixth Circuit.

The tool Congress has forged to police such abuses is the False Claims Act, and the decision below renders that tool useless when the fraud is perpetrated by a municipal

corporation rather than a private corporation. The growing conflict among the lower federal courts on this issue warrants the attention of this Court.

II. THE THIRD CIRCUIT'S HOLDING THAT COUNTIES ARE NOT "PERSONS" SUBJECT TO THE FALSE CLAIMS ACT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Whether a county is a "person" within the meaning of § 3729(a) of the FCA is a question of statutory interpretation requiring an inquiry into congressional intent. "The purpose of Congress is the ultimate touchstone." *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992). The court below erred because it made no inquiry into Congress's compensatory purpose in the FCA and it ignored interpretive norms and presumptions established by this Court's False Claims Act jurisprudence.

A. The Decision Below Cannot Be Reconciled With This Court's Reaffirmation in *Stevens* That FCA "Persons" Include Corporate Entities.

In *Stevens* this Court held that states could not be sued under the FCA due to the "longstanding interpretive presumption that 'person' does not include the sovereign." 529 U.S. at 780. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so

'unmistakably clear in the language of the statute.'" *Will v. Michigan*, 491 U.S. 58, 65 (1989).

Contrary to the misapprehension of the court below (A11-12), no such "clear statement" rule protects municipal corporations. Unlike states, *municipal corporations are not sovereign. Alden v.* Maine, 527 U.S. 706, 756 (1999). As the Seventh Circuit explained in *Chandler,* this Court has never imposed such a demanding requirement "on congressional efforts to make municipal entities amenable to federal legislation." *Chandler*, 277 F.3d at 980 (citing *Bd. of Trustees v. Garrett*, 531 U.S. 356, 368-69 (2001).

Indeed, in *Stevens* this Court explicitly reaffirmed that the "presumption with regard to corporations is *just the opposite* of the one governing here: *they are presumptively covered by the term 'person.'*" 529 U.S. at 782(emphasis added). *See also Chandler*, 277 F.3d at 980 (reading *Stevens* this way). *Stevens* stressed that nothing in the text, structure or history of the FCA "cast[s] doubt upon the courts' assumption that §3729(a) extends to corporations." *Id.* at 782. *See also id.* at 784 n.14. And it is beyond cavil that, like private corporate bodies, public corporations such as "municipalities are persons." *Will*, 491 U.S. at 70; *see also id.* at 69 n.9.

When the FCA was enacted in 1863, it was "thoroughly established" that a statutory reference to "person" included cities and counties. *Monell v. Dept. of Social Services*, 436 U.S. 658, 687-88 & n.50 (1978). *See also Owen v. City of Independence*, 445 U.S. 622, 639 & n.19 (1980); *City of Newport v. Fact Concerts*, 453 U.S.

247, 259 (1981). "[T]his fact was well known to Congress" in the 1860s. *Monell*, 436 U.S. at 688. This rule of construction applies to the FCA, because the main premise of *Stevens* was that Congress in 1986 made no significant changes to §3729(a). Therefore, the 1863 understanding of the term "person" continues to govern the FCA: *"the term 'person' has remained in the statute unchanged since 1863*; the 1986 amendment merely changed the modifier '[a]' to 'any.'" *Stevens*, 529 U.S. at 783 n.12 (emphasis added; brackets in original). There is not even a hint that Congress in 1986 narrowed the definition of "person" to exclude the cities. Municipalities have always been understood to be included within the term "person" used in the FCA. *Id.* at 782.

The Third Circuit ignored 150 years of jurisprudence holding that cities and counties are "persons," and faulted Congress for "not even defin[ing] the term 'person' in the "relevant portion of the Act." (A11). The court below likewise defied *Stevens* by *reversing* the interpretative presumption applicable to municipal corporations and demanding that Congress explicitly name them in order to subject them to FCA remedies: "had Congress intended to subject local governments to punitive damages . . . it could have easily so stated." (A11-12). *See also id.* at (A7-8)("in order to subject municipalities to punitive damage awards, a statute must expressly provide for such an award against a municipality"). These errors in interpreting a vital federal statute merit the attention of this Court.

B. Congress Deliberately Imposed Treble Damages As A Comprehensive Remedy For Fraud On The Treasury, And Thereby Overrode The Common Law Presumption That Cities Are Immune From Punitive Damages.

Having failed to conduct the required inquiry into whom Congress intended to encompass within the statutory term "persons," the court below based its holding that counties are immune from FCA liability entirely on a single passage in *Stevens* which remarked that treble damages generally "are essentially punitive in nature." 529 U.S. at 784-85. (A9). The question of whether (and for which purposes) a particular treble damages regime should be deemed punitive or remedial is a subtle one not susceptible to hasty categorical resolution. On many other occasions, this Court has characterized treble damages regimes as essentially remedial.[4] Moreover, as the Seventh Circuit explained in *Chandler*, a facile reading in isolation of this one passage from *Stevens* "cannot be squared with the essential

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4. *See, e.g., Atlantic Richfield v. USA Petroleum*, 495 U.S. 328, 331 n.1 (1990) (treble damages in Clayton Act are "remedial"); *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) (RICO and Clayton Act treble damages "are designed to remedy economic injury"); *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 757-76 (1982) (antitrust treble damages are "primarily . . . a remedy for the victims of antitrust violations"); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977) (treble damages provision is "designed primarily as a remedy").

rationale of that opinion nor with the established doctrinal differences, long recognized in our jurisprudence, between the status of the states of the Union and municipal entities." 277 F.3d at 980.

We respectfully submit that *Chandler* is correct: the reference in *Stevens* to FCA treble damages must be understood in light of the Court's interpretive presumption in that case that sovereign states are not "persons" under the FCA. That consideration carries far less weight where, as here, this Court has confirmed that the *opposite* interpretive presumption applies — that is, counties *are* "persons" under the FCA. Unlike *Stevens*, in order to uphold the court below, this Court would have to depart from the text of § 3729(a) and dismiss 150 years of jurisprudence holding that counties are "persons." This Court would have to ignore both the clear voice of the legislature and more than a century of jurisprudence in order to conclude that, due to the FCA's treble damages remedy, municipalities that have always been subject to the FCA are now suddenly immune from suit under that Act.

That is an awful lot of weight for a single paragraph in *Stevens* to shoulder. This is especially so given that, even under the authorities this Court invoked in *Stevens*, the most that can be said is that there is a common-law presumption against imposing punitive damages on cities — a common-law rule that Congress is free to override.

There is no absolute rule immunizing cities from punitive damages. There is only a presumption against such liability, derived from the common law and used by

this Court as an aid to statutory interpretation. *See Newport*, 453 U.S. at 263; *Stevens*, 529 U.S. at 784-85. Indeed, this Court has stated that "Congress might have provided [in the FCA] for recovery of 'threefold damages.' . . . This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550-51 (1943). The selection of a proper damages scheme is a matter of legislative discretion.

In *Newport* the Court held that "scrutinizing a claim of immunity proffered by a municipality" requires "careful inquiry into considerations of both history and policy" to determine "both the policies that it [the immunity] serves and its compatibility with the purposes" of the statute in question. 453 U.S. at 259. *See also Chandler*, 277 F.3d at 977. In contrast to the court below, the Seventh Circuit in *Chandler* applied the *Newport* analysis and "examine[d] the purpose of municipal immunity from punitive damages to determine if it is consistent with the False Claims Act." 277 F.3d at 977.

The FCA's treble damages remedy does not implicate the policy objections to punitive damages that concerned the Court in *Newport*. There, the Court concluded that it would be "unwise" to allow a punitive award against a city "[a]bsent a compelling reason . . . not present here." 453 U.S. at 271. In the case at hand, we have a compelling public policy reason established by Congress itself — securing full indemnity for frauds committed on the United States. The victim in this case is not a single individual but We the People. If a fraud is found at trial, treble damages will be appropriate to achieve the

compelling congressional objective of ensuring that the U.S. Treasury is made whole.[5]

As the Seventh Circuit reasoned in *Chandler*:

> Although the trebling of the actual loss is indeed a significant enhancement and punitive in nature, it is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA. It could not be more clear that Congress . . . addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute. . . . Were we to hold counties immune from the FCA's damages scheme, we would frustrate the clear intention of Congress.

277 F.3d at 978.

With respect to the policies that weigh against imposition of punitive damages on a city, *Newport* distinguishes itself from the False Claims Act. The Court expressed its aversion to imposing punitive damages on

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5. This Court has repeatedly held that the double-damages-plus-penalties regime of the pre-1986 FCA was remedial. *Hess*, 317 U.S. at 551-52; *United States v. Bornstein*, 423 U.S. 303, 315 (1976). Congress made plain in 1986 that the move to treble damages was likewise designed as compensatory – an effort to modernize the century-old law to ensure that it still made the government whole. S. Rep. No. 345, 99th Cong., 2nd Sess. 11, 31 (1986); H.R. Rep. No. 660, 99th Cong., 2nd Sess. 17, 20, 25 (1986). This Court has ruled that such congressional judgments are entitled to judicial deference. *Bornstein*, 423 U.S. at 314-15; *Hess*, 317 U.S. at 552; *Hudson v. United States*, 522 U.S. 93, 103-04 (1997).

cities under 42 U.S.C. § 1983 because of the "windfall to a fully compensated plaintiff." 453 U.S. at 267. But, in Congress' judgment, the Government is not fully compensated without treble damages. Treble damages stand in stark contrast to punitive damages schemes where, by definition, the punitive award is on top of the fully adequate compensatory award.[6] Second, under the FCA there is no diversion of public money to an individual private plaintiff in the form of punitive damages. The United States Treasury, having borne the full weight of the defendant's fraud, is also the recipient of the FCA's treble damages.

The Court in *Newport* was also concerned that punitive awards against cities under § 1983 could be unpredictable and substantial, given: (1) the "broad discretion traditionally accorded to juries in assessing the amount of punitive damages;" and (2) the fact that, because "the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." 453 U.S. at 270. These concerns do not exist under the FCA. Neither judge nor jury has unbridled discretion to set punitive damages under the FCA. There are no separate punitive awards: damages are trebled by statutory mandate. No runaway juries are possible and there is no consideration of the defendant's wealth or taxing power. *See Chandler*, 277 F.3d at 978.

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6. Congress formulated the FCA's treble damages to provide the Government a complete indemnity for fraud, including the costs of investigation, prosecution, and consequential damages. See note 5, *supra*.

An FCA judgment against a county could indeed be substantial if the defendant county's fraud were substantial. However, in that event, the damages visited upon the defendant would be proportionate to the totality of the injury inflicted on the Treasury by the defendant's fraud, and the defendant would have no ground for complaint. *Cf. Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 34 (1987) (Stevens, J., concurring) (Court declines to interfere with $13 billion civil judgment because "[t]he exceptional magnitude of those consequences" is the product of the vast size of the wrongs for which defendant was found liable).

The taxpayers of a county found to have defrauded the federal government (and hence subjected to an FCA treble damages judgment) might well feel the pinch, in terms of increased taxes or decreased local services. *Cf. Newport*, 453 U.S. at 267, 270-71. But that burden, while unfortunate, is just. For the taxpayers of that county will also be the very ones who, even if they were not parties to their county's fraud, nevertheless benefitted from that fraud insofar as their county reaped an undue and fraudulent increase in federal funding for the county's programs. *Chandler*, 277 F.3d at 978. In these circumstances, Congress is faced with a choice as to who should bear the cost of that fraud: the taxpayers of the county that perpetrated and benefitted from the fraud, or the innocent and injured taxpayers of the United States. Congress made its choice clear. And it is Congress, not the judicial branch, that the Constitution empowers to make that choice.

As demonstrated above, the FCA has been understood to include municipalities as "persons" amendable to suit since the time of its enactment in 1863. That is the established judicial presumption. This Court held in *Stevens* that neither that presumption nor the definition of "person" was changed by the 1986 FCA amendments. 529 U.S. at 782-83 & n.12. In 1986 Congress understood that the persons liable under the FCA included cities. In the face of that knowledge, Congress deliberately amended the text of the FCA to increase damages from double to treble. Congress effected this increase while simultaneously mandating that no showing of malice or any other specific intent (the scienter required for punitive damages) was necessary. [7] Once liability had been proven, the treble damages provisions applied.

Congress was not sleepwalking. As the Seventh Circuit explained in *Chandler*: "To hold that municipalities are immune, we would have to conclude that, in effecting this increase, Congress intended to exempt municipalities from the FCA *sub silentio*." 277 F.3d at 979. Thus, even if the FCA's treble damages are to be considered punitive, the common-law presumption that counties are not subject to punitive damages has been displaced by Congress's deliberate imposition of treble damages in the 1986 FCA Amendments. In disregarding that

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7. In amending the FCA in 1986, Congress expressly rejected *any* sort of scienter requirement — whether malice or any other "specific intent to submit the false claim" — as wholly out of place in what Congress deemed a "remedial" statute. S. Rep. No. 345 at 7. *See also id.* at 13, 20-21, 31; H.R. Rep. No. 660 at 20-21; 31 U.S.C. § 3729(b).

congressional judgment, the Third Circuit has usurped the legislative power. Review by this Court is warranted.

III. THE THIRD CIRCUIT'S HOLDING THAT INDIVIDUALS CANNOT BE LIABLE UNDER THE FCA UNLESS THEY INTENDED TO BENEFIT PERSONALLY FROM THE FALSE CLAIM IS AN UNPRECEDENTED AND LAWLESS JUDICIAL AMENDMENT OF A STATUTE.

Petitioner Mr. Dunleavy sued not only Delaware County, but also, in his personal capacity, Mr. Hayes – the county executive who perpetrated the alleged fraud on the federal Government. The Third Circuit held that "an employee of a local governmental unit is not subject to suit under the Act when the employee does not personally benefit from the transaction constituting a violation of the Act." (A4).

This was the entirety of the court of appeals' discussion of the issue. It offered no analysis of the text of the FCA, no reasons, no citation to any authority. It introduced this holding with the phrase "we note in passing," and it concluded with the observation "that no extended discussion is necessary with respect to this issue." (A4).

This holding left both Petitioner and the United States, which appeared below as *amicus curiae* on behalf of Petitioner on this issue, dumbfounded. The court below simply made up, out of whole cloth, a new requirement for

liability under the False Claims Act, and then stitched that requirement into the statute without a word of explanation. This judicial usurpation of the legislative role warrants the attention of this Court.

Although the court below apparently did not trouble itself to investigate the matter, the prevailing rule is that municipal officers in their individual capacity are proper defendants under federal statutes. For example, in *Hafer v. Melo*, 502 U.S. 21(1991), this Court held that government officers were proper "persons," and therefore proper defendants, when sued in their personal capacity in an action under the Civil Rights Act, 42 U.S.C.§1983. The Court reasoned that "officers sued in their personal capacity come into court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'" *Id.* at 27 (citing *Will*, 491 U.S. at 71 n. 10). While noting that some governmental officers may, in certain circumstances, enjoy various immunities to suit, the Court nonetheless applied the general rule that personal capacity suits against governmental officers were permissible.

The court below offered no textual analysis or other basis for distinguishing the False Claims Act from such statutes as the Civil Rights Act. Certainly no basis for a requirement of individual profit-taking can be found in the text of the FCA. FCA liability attaches to "any person" "who knowingly presents, or causes to be presented" "a false or fraudulent claim for payment or approval;" "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;" or "knowingly

makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. §3729(a)(1), (2) and (7).

Such a person is liable to the Government for damages which occur *"because of the act of that person." Id.* (Emphasis added.) In *Hess*, 317 U.S. at 544-45, this Court held that the Act reaches "any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." The motive of the perpetrator, or the ability of the perpetrator to achieve personal financial gain from the violation, is irrelevant.[8]

The Third Circuit's cavalier rewriting of the False Claims Act to include a new element for individual liability warrants review by this Court.

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8. There has been no suggestion that the Government was not damaged by Respondent Hayes' actions. Instead, the Third Circuit's holding requires that any damages suffered by the Government have personally benefitted the defendant who perpetrated the fraud.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Filed January 29, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3691

UNITED STATES OF AMERICA EX REL.
ANTHONY J. DUNLEAVY

v.

COUNTY OF DELAWARE, MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIRMAN; MATTHEW J. HAYES JR. AS ADMINISTRATOR OF THE ESTATE OF MATTHEW J. HAYES

Anthony J. Dunleavy,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 94-cv-07000)
District Judge: Honorable Thomas N. O'Neill, Jr.

Argued December 7, 2001
Before: MANSMANN, ROTH and FUENTES,
Circuit Judges.

(Filed: January 29, 2002)

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OPINION OF THE COURT

MANSMANN, Circuit Judge.

The appellant, Anthony J. Dunleavy, was a consultant to appellee, Delaware County. In this capacity, Dunleavy advised the County as to the various federal regulatory requirements concerning certain Housing and Urban Development funding grants. Dunleavy sued the County contending that it committed several violations of the False Claims Act, 31 U.S.C. S 3729, et seq. The District Court dismissed Dunleavy's Second Amended Complaint, holding that the County was not amenable to suit under the FCA due to its mandatory punitive damages scheme. We agree. Therefore, we will affirm the Order of the District Court.

I.

This appeal requires us to determine whether a local governmental subdivision can be subject to

suit under the False Claims Act when the Act mandates treble damages. We must first determine whether the treble damages mandated by the Act are punitive. If so, we must then decide whether Congress clearly manifested its intention under the FCA to abrogate local governmental common law immunity from punitive damage awards. If it did not, we must further determine whether a local governmental subdivision may nevertheless be amenable to suit under the Act albeit subject to some lesser quantum of damages. Finally, we note in passing that we agree with the District Court that an employee of a local governmental unit is not subject to suit under the Act when the employee does not personally benefit from the transaction constituting a violation of the Act; therefore, we conclude that no extended discussion is necessary with respect to this issue.

II.

In 1976, Delaware County purchased the Penza tract in a condemnation action using HUD funds. The intended use of the Penza tract was to expand a pre-existing park. In 1979, however, the County entered into an agreement with the Pennsylvania Department of Transportation (Penn DOT) whereby Penn DOT purchased 26.3 acres of the Penza tract. Penn DOT made additional purchases from the tract through the years until its final purchase from the County in 1988. Penn DOT intended to use the land for highway construction. After consulting with Dunleavy, the County decided that it would put the

proceeds from the sales of Penza tract land into an interest-bearing account under the assumption that if Penn DOT was unable to use its newly acquired lands for highway construction the County would repurchase the land. On the other hand, if Penn DOT completed its highway construction, the County would return the proceeds from the land sales, plus interest to HUD. After numerous delays, Penn DOT completed its highway construction project in 1991.

During the interim, the County occasionally used funds from the Penza tract account for general County purposes. Dunleavy contends that this was improper, because, in his view, the funds in the account were HUD program funds subject to various reporting requirements with which the County failed to comply. Further, Dunleavy contends that once the County knew that it would not be repurchasing the tract, the County knowingly failed to return the principal and interest earned on the account to HUD. Dunleavy's final contention is that the County fraudulently received additional monies from HUD in fiscal years `92, `93, `94, and `95 because the County took these monies knowing that it committed the previously alleged violations of HUD regulations with respect to Penza Tract funds.

Dunleavy filed this action in 1994 seeking treble damages as required by the False Claims Act. In 1995, the Government declined to intervene, concluding that no fraud had been committed.

HUD, however, after a Limited Review Audit, demanded that the County pay it 1.7 million dollars plus interest. In 1996, HUD and the County settled the dispute between them without including Dunleavy in the settlement process.[1]

The District Court dismissed Dunleavy's Second Amended Complaint for lack of subject matter jurisdiction, a Judgment that we reversed and remanded to the District Court. The County then filed motions to dismiss for failure to state a claim and failure to plead with particularity, which were denied by the District Court. On May 23, 2000, the District Court, on its own motion, directed the parties to brief the question of whether this action should proceed in light of the United States Supreme Court's decision in Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000). The District Court concluded that Dunleavy's claim could not proceed in light of Stevens. See United States ex rel. Dunleavy v.

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1. The False Claims Act permits the Government to settle with the Defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. See 31 U.S.C. § 3730(c)(2)(B) (1994). Therefore, in this case, Dunleavy as relator is prosecuting a qui tam civil action in the name of the Federal Government after the Government has determined that, in its view, no fraud has been committed. Accordingly, we do not consider the question of whether the United States may maintain a suit against a local government under the FCA.

County of Delaware,2000 WL 1522854 (E.D.P.A. 2000). This timely appeal followed.[2]

We begin our analysis with a brief discussion of the legal framework controlling the resolution of this appeal.

III.

Unless Congress clearly provides otherwise, a local governmental entity is immune from punitive damages awards. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (holding that a municipality was immune from punitive damages awards under 42 U.S.C. S 1983 because at common law a municipality was absolutely immune from punitive damages and in enacting section 1983 Congress did not clearly manifest an intention to abrogate this common law immunity). Similarly, in Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991), we held that municipalities were immune from civil punitive damage awards under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. SS 1961-1968. In reaching our holding in Genty, we cited Fact Concerts and commented that in order to subject municipalities to punitive damage awards, a statute must

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2. The District Court had jurisdiction under 28 U.S.C. S 1331, and the appeal was taken in accordance with Rule 4(a), Fed. R. App. P. We have jurisdiction under 28 U.S.C. S 1291. The questions of law before us are subject to our plenary review. Bowen v. Monus , 172 F.3d 270, 273 (3d Cir. 1999).

expressly provide for such an award against a municipality. See Genty, 937 F.2d at 910. Furthermore, we noted that the rationale for exempting a municipal entity from punitive damages awards is firmly grounded in public policy because "assessing punitive damages against a public entity serves neither the retributive nor the deterrent purposes of . . . civil punishment and contravenes public policy by punishing the taxpayers and citizens who constitute the very persons who `are to benefit from the public example which the granting of such damages is supposed to make of the wrongdoer.' " Id. at 910 (citation omitted). Simply stated, we concluded that a local government is presumptively immune from the imposition of punitive damages unless the statutory scheme which creates liability clearly indicates that Congress intended to abrogate the well-settled notion of local governmental common law immunity from punitive damages. See also Doe v. County of Centre, 242 F.3d 437, 456 (3d Cir. 2001) (holding that overcoming common law immunity requires a clear expression of congressional intent).

We now turn to the threshold question on this appeal: whether the damages imposed by the Act are punitive. If the damages are properly characterized as punitive, we must next determine whether Congress expressly intended to abrogate local governmental immunity under the FCA. For the reasons that follow, we believe that the mandatory treble damages imposed by the Act are punitive and that Congress did not expressly

abrogate local governmental immunity under the FCA.

A.

When first enacted in 1863, the FCA provided for suits to be brought in the name of the Government by private individuals in a qui tam (in the name of the King) action. The Act imposes liability on any person who knowingly presents a false claim to the Federal Government for payment. 31 U.S.C. S 3729(a) (1994). The current version of the Act imposes a civil penalty between five and ten thousand dollars per false claim plus three times the amount of damages which the Government sustains. 31U.S.C. S 3729(a) (1994). Recently, in Vermont Agency of Natural Resources v. United States ex rel. Stevens , 529 U.S. 765 (2000), the United States Supreme Court examined the issue of whether a State or State agency is a "person" for purposes of the Act. In reaching its conclusion that a State is not within the meaning of "person" as used in the Act and therefore not amenable to suit under the Act by a qui tam realtor, the Court held that the Act imposes treble damages that are "punitive in nature." Id. at 784. Thus, the Court has answered the first prong of our inquiry: the FCA's treble damages provision is punitive. Accord United States ex rel. Garibaldi v. Orleans Parish Sch. Bd. , 244 F.3d 486, 491 n.5 (5th Cir. 2001) ("The treble damages imposed by the False Claims Act are punitive damages.") (citing Stevens, 529 U.S. at 784).

Nonetheless, Dunleavy contends that the Supreme Court's characterization of the Act's damages provision is obiter dictum. We do not agree. The Stevens majority stated that "[s]everal features of the current statutory scheme further support the conclusion that States are not subject to qui tam liability," and that one of those features is that "the current version of the FCA imposes damages that are essentially punitive in nature." Stevens, at 783, 784. Clearly, the Court relied on the Act's treble damages scheme in reaching its holding and thus its declaration that the damages scheme is punitive is not dictum. We therefore agree with the Garibaldi court and conclude that the treble damages mandated by the FCA are punitive. See also Genty, 937 F.2d at 914 (holding that the mandatory treble damages scheme of civil RICO statute is punitive in character).

B.

We turn to the second prong of our inquiry: Did Congress express a clear indication to abrogate local governmental immunity under the FCA? We note here that the parties' arguments focus on whether the term "person"s used in the Act encompasses local governments. This argument is simply the other side of the coin with respect to the question before us, namely whether Congress clearly abrogated local governmental immunity under the FCA. If Congress clearly expressed its intention to encompass local governments within the ambit of FCA liability as a"person," then it must also have

intended to abrogate the common law immunity of local governments against punitive damages under the FCA. In our view, consistent with our reasoning in Genty, the question is whether Congress intended to disturb local governmental immunity from punitive damages by subjecting local governments to FCA suits. See Genty, 937 F.2d at 914 (noting that the RICO statute expresses no specific intention that municipalities be liable for treble damages); see also Will v. Michigan Dep't of State Police, 491 U.S. 58, 67 (1989) (holding that Congress did not intend to override well-established common law immunities in passing civil rights act).

Dunleavy's assertions that Congress intended to subject municipalities to the FCA's coverage are unpersuasive in light of the fact that the statute offers no clear indication that Congress intended to abrogate local governmental immunity from punitive damages. Indeed, the relevant portion of the Act does not even define the term"person." In Genty, we observed that the civil RICO Act defined the word "person" as "any individual or entity capable of holding a legal or beneficial interest in property." Genty, 937 F.2d at 907 (quoting 18 U.S.C. S 1961(3)). Clearly, this definition of the term "person" is a broad one. Yet we nevertheless found that despite this broad definition of the term "person", Congress did not clearly abrogate local governmental immunity from punitive damages in the context of civil RICO. Moreover, we observed that had Congress intended to subject local governments to punitive damages under RICO, it

could have easily so stated, as it has done in other statutes imposing civil liability on local governments. See Genty, 937 F.2d at 914 (citing 15 U.S.C. S 77b(2)) (noting that Congress specifically provided for subjecting local governments to civil damage awards under the securities laws). Other statutes specifically define the term "person" to include local governments or municipalities, such as the Clean Water Act, 33 U.S.C. S 1362(5); the Resource Conservation and Recovery Act, 42 U.S.C. S 6903(15); the Wild Bird Conservation Act of 1992, 16 U.S.C. S 4903(4); and the Oil Pollution Act of 1990, 33 U.S.C. S 2701(27). Our Genty analysis is equally applicable here. We find nothing on the face of the relevant portions of the FCA as originally enacted in 1863 or in its current form which evidences a clear indication on the part of Congress to subject local governments to punitive damages under the Act. The Act is utterly devoid of any specific intention to subject local governments to its strictures. This lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Dunleavy and amicus Taxpayers Against Fraud (False Claims Act Legal Center) argue that the original drafters' intent is immaterial to a determination of Congress' intent to subject local governmental subdivisions to liability under the FCA. He contends the intent of the Congress that enacted the treble damages scheme should control whether or not Congress intended to subject local

governments to the FCA. His argument is premised on the notion that if in 1863, Congress intended to encompass local governments within the meaning of the term "person" under the FCA, the subsequent amendment in 1986 to provide treble damages under the FCA is evidence of Congress' intent to subject local governments to punitive damages.

Even if we were persuaded that the intent of the 1986 Congress amending the Act controlled the resolution of this matter, Dunleavy's argument must fail. The 1986 amendments added nothing to the meaning of the term "person" that remotely approaches a clear expression of Congress' intent to abrogate local governmental immunity. See Stevens, 529 U.S. at 783 n.12 (observing that the term "person" in the FCA has not been altered since the FCA's initial passage in 1863). Moreover, in Genty, we found that Congress' imposition of treble damages in the RICO statute evinced its intent to exclude local governments from the civil RICO statute's coverage. See Genty, 937 F.2d at 914 (Courts will not interpret statutes to overturn well-established common law principles unless Congress so authorizes"); County of Centre, 242 F.3d at 456 (3d Cir. 2001) (noting that Newport instructs us to assume that Congress intended to retain common law immunity absent a clear expression of congressional intent to the contrary). As a result, we cannot say that the imposition of the current treble damages scheme in and of itself evidences Congress' clear intent to abrogate common law immunity and subject local governments to punitive

damages awards. We conclude that Congress' imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA. Accord Garibaldi, 244 F.3d at 493 (stating that the punitive damages regime of the FCA reflects Congress' intent to exclude local governments from liability under the FCA).

Second, Dunleavy points to the legislative history of the 1986 amendments to support his theory that Congress intended to subject local governments to suit under the FCA by qui tam relators. We reiterate that even if we believed that the intent of the 1986 Congress controlled our determination, a question we do not decide here, Dunleavy's argument cannot pass muster in light of the Stevens Court's express rejection of the pertinent 1986 legislative history as erroneous and of questionable value. See Stevens, 529 U.S. at 783 n.12 (noting that the legislative history contained the Senate's erroneous understanding of the meaning of the term "person" as used in the Act). At best, after considering the text of the statute and its legislative history, we find only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA. Ambiguity, however, is not enough for Dunleavy to carry the day. There is simply nothing in the FCA's text remotely manifesting a clear expression of Congress' intent to abrogate local governmental immunity against punitive damages under the Act. As a result, we hold that

Congress did not intend to disturb local governmental immunity from punitive damages under the FCA by clearly including local governments within the meaning of the term "person." It necessarily follows that the County is immune from claims under the FCA by a qui tam relator due to the mandatory nature of the treble damages provision. See Genty, 937 F.2d at 911-12 (treble damages awards under RICO are mandatory and therefore municipalities may not be liable under RICO if those damages are punitive).

C.

Dunleavy and the United States, as amicus, invite us to subject the County to "some liability", however, by reading into the statute an exception to the mandatory treble damages scheme. In essence, Dunleavy and the United States argue that we should reduce any treble damages award against a local government to a level that would be deemed compensatory rather than punitive. We decline to create such an exception under the FCA, just as we declined in Genty with the RICO statute. Genty, 937 F.2d at 914. The FCA provides for mandatory treble damages subject to a narrow exception that is not applicable to the case sub judice. See 31 U.S.C. S 3729(a) (providing a reduction from treble damages to double damages when a defendant supplies information concerning the violation prior to their knowledge of governmental investigation). As a result, creating an exception for local governments from the existing damages scheme would require us

to rewrite the FCA. Of course, while Congress is free to do this if it chooses, such redrafting is outside the traditional province of the courts. Accord Garibaldi, 244 F.3d at 493. Therefore, we will not disturb the existing statutory damages provisions by reading into the Act an exception from treble damages for local governments. The result, in the end, is that a local government such as Delaware County cannot be subject to liability under the FCA in a qui tam action.

IV.

We conclude that the mandatory treble damages scheme imposed by the FCA is punitive and that local governments are exempt from FCA damages because Congress did not clearly express its intention under the Act to abrogate local governmental common law immunity against punitive damages. As a result, since the FCA does not, as written, permit a court to reduce treble damages awards, we conclude that a local government cannot be subject to suit by a qui tam relator under the Act. For all these reasons, we will affirm the Order of the District Court dismissing Dunleavy's Second Amended Complaint.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES ex rel., ANTHONY DUNLEAVY v. THE COUNTY OF DELAWARE, et. al.

CIVIL ACTION NO. 94-7000

October 12, 2000, Decided

October 12, 2000, Filed

JUDGES:
THOMAS N. O'NEILL, JR., J.

OPINION BY:
THOMAS N. O'NEILL, JR.

MEMORANDUM

This is a qui tam action brought on behalf of the United States under the False Claims Act, 31 U.S.C. § § 3729-3733, (FCA) by plaintiff/relator Anthony J. Dunleavy, alleging that Delaware County and other defendants fraudulently retained Department of Housing and Urban Development (HUD) funds.

The following is a description of the relevant facts.

In 1976, Delaware County purchased a 56.6 acre tract of land known as the "Penza Tract" using

approximately $ 1,839,500 of HUD funds. At the time of this purchase Mr. Dunleavy was an employee of a paid consultant to the County, whose role was to advise the County with respect to HUD's Community Development Block Grant ("CDBG") program and other related federal government programs. [1] The intended use for the Penza Tract was to expand a pre-existing park. In January of 1979, the County entered into an agreement with the Pennsylvania Department of Transportation ("PennDOT"), in which PennDOT purchased 26.3 acres of the Penza Tract for approximately $ 1,988,550. In 1981, PennDOT bought an additional 1.9 acres for $ 103,950 and in 1988 the County received $ 1,000,000 from PennDot for a third parcel of the Penza Tract. The land was to be used by PennDot for the construction of a new highway, known locally as the "Blue Route." In consultation with Dunleavy, the County decided to put the proceeds from the sale of portions of the Penza Tract into an escrow account termed the "Penza Tract fund," with the idea that the money would be used to buy back the land in the event the highway was not constructed. Should the Blue Route be completed, the County was to return the funds, plus interest, to HUD.

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1. HUD's CDBG program provides block grants to communities which may be used only for purposes considered both eligible and fundable under the program's regulations. See 42 U.S.C. § § 5301, et seq.; 24 C.F.R. § 570.500, et seq.

After lengthy delays, the Blue Route was finally opened for public use in December 1991. During the interim the County occasionally used the money in the Penza tract for non-HUD purposes including general County expenses. Dunleavy left the service of the County in 1992 when his firm's contract was terminated. Dunleavy contends that the Penza Tract fund was subject to an agreement between the County and the federal government that required the County to follow HUD CDBG guidelines limiting the permissible uses of the funds and imposing certain reporting requirements on the County. Since the Penza Tract was originally bought with HUD funds, Dunleavy maintains that the County was required to treat the money it received from PennDot as HUD "program funds" and to provide accounts of transactions involving such money to that agency. Further, once it became apparent that the County would not be reacquiring the Penza Tract, Dunleavy contends that the County knowingly failed to return the principal plus interest from the Penza Tract fund to the government. Finally, Dunleavy alleges that as a result of the County's failure to report and return the Penza Tract funds in October of 1992 (the end of the fiscal year 1991), the County fraudulently received additional HUD funds during the fiscal years 1992, 1993, 1994, and 1995.

On November 18, 1994, Dunleavy initiated this suit seeking to recover the return of HUD funds made available to the County, trebled pursuant to the FCA. This action remained under seal as

required by 31 U.S.C. § 3730 (b)(2), until September 5, 1995, while the U.S. Attorney and HUD investigated the viability of Dunleavy's complaint.[2] Following this investigation, the U.S. Attorney issued a Notice of Declination of Appearance pursuant to 31 U.S.C. § 3730(b)(4)(B), stating that the actions alleged in Dunleavy's complaint did not constitute fraud.[3] The U.S. Attorney then turned over control of the investigation to HUD to review the matter for compliance with CDBG guidelines. In April of 1996, HUD issued a Limited Review Audit and made a demand on the County for the return of $ 1,779,299 plus interest. On September 11, 1996, HUD agreed to accept the County's settlement offer of

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2. Under the FCA, a private individual (a "relator") may bring a qui tam civil action in the name of the Federal Government. Before proceeding with the suit, the FCA requires a qui tam relator to disclose to the government the information on which the claim is based. 31 U.S.C. § 3730(b). The government then has sixty days to investigate the matter and to decide whether to intervene. The government may also enter the action at a later date upon a showing of "good cause." 31 U.S.C. § 3730(c)(3). The relator receives a share of any proceeds from the action regardless of whether or not the government intervenes. This share ranges from fifteen to twenty-five percent if the government intervenes, depending on the relator's contribution to the prosecution, and from twenty-five to thirty if it does not, depending on the court's assessment of what is reasonable.

3. "It is the government's view, following an investigation, that the matters raised in the relator's complaint do not involve fraud." Notice of Declination of Appearance of the United States, pursuant to 31 U.S.C. § 3730(b)(4)(B), Aug., 10, 1995.

$ 1,921,699. During the settlement negotiations Dunleavy claimed he was entitled to receive notice and a hearing pursuant to section 3730(c)(2)(B) of the FCA.[4] HUD denied him the opportunity to intercede and participate in the negotiations. Under the settlement the County was to turn over the funds to HUD, who would then return the money to the County in the form of a line of credit, where it would be available for properly funded activities. Dunleavy's attempts to stay the administrative action necessary for execution of the settlement were denied by me[5] and by the Court of Appeals.

Dunleavy is suing Delaware County, and current and former county officials, under the FCA to recover $ 4,350,000 in damages ($ 1,450,000 tripled under the statute); civil penalties; interest accrued on the monies between 1980 and October 1992; pre-judgment and post-judgment interest; and the amount of all HUD grants and loans made during the fiscal years 1992, 1993, 1994, and 1995, which plaintiff alleges is at least $ 16,466,000, plus pre-judgment and post-judgment costs. (Pl. Sec. Am. Comp. Counts 1-3). Plaintiff also asserts claims

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4. "The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." § 3730 (c)(2)(B).

5. I denied Dunleavy's motion for a stay because Dunleavy's Second Amended Complaint had been dismissed pursuant to my July 12, 1996 Memorandum and Order at the time the motion was filed.

of fraud, unjust enrichment, payments under mistake of fact and breach of contract. Id. Counts 4-7.

I dismissed Dunleavy's Second Amended Complaint for lack of subject matter jurisdiction because in my view the action was based on publicly disclosed information. See United States ex rel. Dunleavy v. County of Delaware, 1996 U.S. Dist. LEXIS 9792, No. 94-7000, 1996 WL 392545 (E.D. Pa. July, 12 1996). The Court of Appeals reversed and remanded the case for further proceedings.[6] See 123 F.3d 734 (3d Cir. 1997). Defendants then moved to dismiss Dunleavy's claim pursuant to Fed. R. Civ. P. 12(b)(6), failure to state a claim, and Fed. R. Civ. P. 9(b), failure to plead allegations with sufficient particularity. These motions were denied. See United States ex rel. Dunleavy v. County of Delaware, 1998 U.S. Dist. LEXIS 4029, No. CIV. A. 94-7000, 1998 WL 151030 (E.D. Pa. Mar. 31, 1998). Plaintiff subsequently moved for a hearing pursuant to 31 U.S.C. § § 3730(c)(2)(B) and (c)(5) to determine whether the settlement was fair and reasonable and, if it was, for a determination of the relator's share in the proceeds of HUD's Limited Review Audit under 31

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6. The Court of Appeals held that a HUD grantee performance report prepared by the County and submitted to HUD did not qualify as an "administrative report" for purposes of the public disclosure bar under 31 U.S.C. § 3730(e)(4)(A). The Court found that only those actions based on reports that originate with the federal government are barred under the FCA. 123 F.3d 734 at 746.

U.S.C. § 3730(d). This motion was denied [7] as was plaintiff's motion for an interlocutory appeal on this issue pursuant to 28 U.S.C. § 1292. I ordered the qui tam action to proceed as directed by the Court of Appeals.[8]

On May 23, 2000, I directed the parties to brief the question of whether this action should proceed in light of the Supreme Court's decision in Vermont Agency of Natural Resources v. United States ex rel. Stevens, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000).[9] The United States also submitted a brief in support of plaintiff's right to proceed.[10] After consideration of the Stevens decision, I conclude that plaintiff's action may not continue against

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7. I held that the Limited Review Audit was not an "alternate" or "administrative proceeding to determine a civil money penalty" under section 3730(c)(5) of the FCA.

8. The Court of Appeals held "since Dunleavy is a proper relator, has an interest in pursuing his claim independently of the government, the government, which has not elected to intervene, cannot compromise Dunleavy's claim even if the government has settled its own claim. A viable case or controversy therefore continues to exist since Delaware County's potential exposure in Dunleavy's qui tam action may ultimately exceed that which it accepted in its settlement with HUD." 123 F.3d at 739.

9. This Order also denied all pending motions as moot with leave to renew at a later date if necessary.

10. I have considered the government's brief; however I note that the United States has not intervened in this action and did not move for leave to file an amicus curiae brief.

Delaware County due to the punitive nature of the damages mandated by the FCA.

DISCUSSION

The FCA imposes civil liability upon "any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The statute was initially passed in 1863 and until 1986 provided for a private civil action with remedies of double damages and civil penalties for each false claim. In 1986 Congress amended the statute increasing liability to "a civil penalty of not less than $ 5000 and not more than $ 10,000, plus three times the amount of damages which the Government sustains," except in certain specific circumstances where "the court may assess not less than two times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a). [11]

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11. Such circumstances exist where (A) a violator furnishes investigating officials all information known to such person about the violation within thirty days after the date on which the defendant first obtained the information; (B) such person fully cooperated with the government's investigation of such violation; and (C) at the time such person furnished the United States with the information, no criminal prosecution, civil action, or administrative action had commenced under the FCA with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into such violation. 31 U.S.C. § 3729(a)(A-C)

There has been a division among district courts as to whether or not a local government entity is a "person" which can be sued by a qui tam relator under the FCA. See United States ex rel. Graber v. The City of New York, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (holding that a city is not a "person" under the FCA); United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546 (E.D. La. 1999) (holding that the term "person" under the FCA includes the political subdivisions of states); United States ex rel. Chandler v. The Hektoen Inst. for Med. Research, 35 F. Supp. 2d 1078 (N.D. Ill. 1999) (holding that a county is a "person" under the FCA).

The Supreme Court granted certiorari in the Stevens case to resolve whether "a private individual may bring suit in federal court on behalf of the United States against a state (or a state agency) under the False Claims Act." 120 S. Ct. at 1860. On May 22, 2000, Justice Scalia writing for the majority in Stevens issued a two-part holding. First, the Court held that a private individual who brings a qui tam suit under the FCA has standing to sue so long as the United States has suffered an injury. Second, the Court held that states are not included within the FCA's definition of the word "person," and therefore, at least in cases where the government has not intervened, states may not be sued by qui tam relators.

In determining whether a state may be subject to qui tam liability under the FCA, the Stevens Court began its analysis by stating that it need not reach

any Eleventh Amendment issue as the question of whether a state is a "person" subject to qui tam liability under section 3729(a) of the FCA could be decided solely on statutory grounds. Id. at 1866. The Court stated there is a presumption that the term "person" does not include sovereigns that may be overcome only if there is some showing of statutory intent to the contrary. Id. at 1867. Despite finding that the liability provision in the original FCA had undergone a number of changes since it was enacted in 1863, Justice Scalia held that "none of them suggests a broadening of the term 'person' to include States" and the text of the statute itself does "less than nothing to overcome the presumption that States are not covered." Id. at 1868.

The Court listed three additional reasons why states should not be subject to qui tam liability. First, the section of the FCA concerning the attorney general's authority to issue civil investigative demands, 31 U.S.C. § 3733, expressly defines "person" to include states. Justice Scalia reasoned that since section 3729(a), the provision of the FCA creating liability, did not define "person" the absence of an express definition including states suggests that they are not "persons" for purposes of qui tam liability. Id. at 1868-69.

Second, and particularly relevant to Dunleavy's claim, the Court stated that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent

with state qui tam liability in light of the presumption against the imposition of punitive damages on governmental entities." Id. at 1869. The Court acknowledged that it had in the past labeled damages under the pre-1986 FCA as remedial rather than punitive, but noted the contrast between the old statute and the current version which generally imposes treble damages and a civil penalty of up to $ 10,000 per claim. Id.

Finally, the Court noted that the Program Fraud Civil Remedies Act of 1986 (PFCRA), a "sister scheme" of the FCA creating administrative remedies for false claims, has a definition of "persons" subject to liability that does not include states. Justice Scalia reasoned that it would be peculiar to subject states to treble damages and civil penalties in qui tam actions under the FCA, but to exempt them from lesser damages under the PFCRA. Id. at 1870.

The issue for me to resolve is whether absent federal intervention an individual may pursue claims under the FCA against a county.[12] One of plaintiff's central arguments is that Stevens is inapplicable to this matter as the Stevens Court applied a statutory analysis similar to an Eleventh Amendment inquiry that is relevant only to states. According to the plaintiff since Delaware County is

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12. The issue of whether the United States, either as the initial plaintiff or as an intervener, may bring suit under the FCA against a local government entity is not before me.

not a state and may not claim protection under the Eleventh Amendment defendants "cannot claim they fall within the issues discussed in Stevens." (Pl.'s Br. Resp. to Stevens at 6). I agree that the Court's holding in Stevens does not directly resolve the issue presented by this action. This does not mean, however, that the reasoning utilized by the Stevens Court is inapplicable to the circumstances surrounding Dunleavy's claim. In particular, Justice Scalia's explicit reference to the damage provision of the FCA as "essentially punitive in nature," rendering it inappropriate "in light of the presumption against the imposition of punitive damages on governmental entities," has a significant impact on the present matter. Stevens, 120 S. Ct. at 1869.[13] Under the Stevens rationale, the FCA imposes mandatory damages that are punitive in nature that may not be brought by a qui tam relator against a county.

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13. Such statements may not, as plaintiff suggests, be dismissed as mere dicta. (Pl.'s Br. Resp. to Stevens at 13). The punitive nature of the damage provision was cited by the Court as one of "several features of the current statutory scheme that further support the conclusion that States are not subject to qui tam liability." Stevens 120 S. Ct. at 1869. Even if this determination were not essential to the judgment, it is persuasive, if not mandatory, authority. It is worth noting the Seventh Circuit has already cited Stevens for the proposition that treble damages are punitive. See Perez v. Z Frank Oldsmobile, 223 F.3d 617, 2000 WL 1049185 *5 (7th Cir. 2000).

I. Treble Damages under the FCA are Punitive and May not Be Imposed on a County

The Stevens Court held that states presumptively are not covered by the term "person," and that nowhere in the FCA or its history is there sufficient indication that Congress intended to overcome this presumption. Id. at 1868. Local government entities, however, are in a different posture as they typically have been presumed to be persons at common law. Plaintiff maintains therefore that in the absence of any statutory definition counties presumptively ought to be considered "persons" under the FCA. (Pl.'s Br. Resp. to Stevens at 7-8). Both plaintiff and the government find support for this position by pointing out that such entities have been considered "persons" under other federal statutes. (Pl.'s Br. Resp. to Stevens at 9; Govt.'s Br. Resp. to Stevens at 6-8, citing Monell v. Department of Social Servs. of the City of New York, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)). However, neither of these assertions address the Stevens Court's statement that the damage provision of the FCA is "essentially punitive in nature." In making this determination, the Court reiterated the presumption it established in City of Newport v. Fact Concerts, 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981), that governmental entities may not be subjected to punitive damages. Stevens, 120 S. Ct. at 1869.

Newport involved the application of punitive damages to a municipality under 42 U.S.C . § 1983. In analyzing the historical context that produced this statute, the Newport Court stated that

> it was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortuous activity, but this understanding did not extend to the award of punitive or exemplary damages. Indeed, the courts that had considered the issue prior to 1871 were virtually unanimous in denying such [punitive] damages against a municipal corporation.

Newport, 453 U.S. at 259. In Stevens Justice Scalia employed this rationale in support of the Court's holding that the FCA may not be applied by qui tam relators against states. It is therefore almost inescapable that the same would be true concerning counties and other state subdivisions, the very subject matter before the Court in Newport.

I do not agree with the government's suggestion that subjecting a county to treble damages under the FCA is somehow more acceptable than applying punitive damages to a municipality under section

1983. (Govt.'s Br. Resp. to Stevens at 9).[14] The government cites Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), and American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 574, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982), antitrust cases, for the proposition that treble damages are not punitive. (Govt.'s Br. Resp. to Stevens at 10). But in addition to the unequivocal language of Stevens labeling the treble damage provision of the FCA punitive, Justice Scalia cited Texas Industries, Inc v. Radcliff Materials, Inc., 451 U.S. 630, 639, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981), for the proposition that "the very idea of treble damages reveals an intent to punish past and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." Stevens, 120 S. Ct. at 1870.

Further, courts have long shown a reluctance to impose treble damages on state subdivisions. In Hunt v. City of Boonville, 65 Mo. 620 (1877), cited approvingly by the Newport Court, the Missouri

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14. In its brief the government also asserts without citation that "unlike the punitive damages contemplated by the Court in Fact Concerts . . . the FCA damages are imposed by a judge." (Govt.'s Br. Resp. to Stevens at 9). However, as the Garibaldi court stated in determining the viability of a qui tam suit under the FCA, "where the evidence at trial shows a range of possible damages, the jury 'enjoys substantial discretion in awarding damages within the range showed by the evidence.'" 46 F. Supp. 2d at 562, citing Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 372 (5th Cir. 1990).

Supreme Court held that a municipality could not be found liable for treble damages under a trespass statute notwithstanding the statute's authorization of such damages against "any person." Newport, 453 U.S. at 261. The Hunt court noted the existence of "respectable authority" in support of the proposition that municipal corporations "can not, as such, do a criminal act or willful and malicious wrong and they cannot therefore be made liable for exemplary damages." 65 Mo. at 624. Similarly, the Sixth Circuit in Barnier v. Szentmklosi refused to allow a treble damages award for the malfeasance of its police officers since damage awards against municipalities would not serve the purposes of deterrence and punishment and could create a serious risk to their financial integrity. 810 F.2d 594, 598-99 (6th Cir. 1987). This rationale is similar to that employed by the Newport Court which stated that since a "municipality ... can have no malice independent of the malice of its officials, damages awarded for punitive purposes... are not sensibly assessed against the governmental entity itself." Newport, 453 U.S. at 267. The Court also pointed out that "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." Id. at 268. Such purposes would be no better served by allowing Dunleavy to recover treble damages against Delaware County, particularly since there has been no allegation that any individual defendant acted for his own benefit, profited at the

public's expense, spent the money in question for any reason other than for public purposes, or acted in anything other than his official capacity.

Treble damages are a form of punitive damages, generally applied because of the wanton, reckless, malicious, or oppressive character of the acts complained of and as a warning to deter the offender from committing like offenses in the future. See Joel E. Smith, Recovery of Exemplary or Punitive Damages from Municipal Corporations, 1 A.L.R.4th 448 (Supp. 2000). I agree with Graber, 8 F. Supp. 2d at 345: "the False Claims Act was passed to protect the taxpayers. It was not intended to provide the federal government with a means to punish city and state taxpayers for the alleged wrongdoing of their local government officials." Plaintiff's contention that Delaware county is a "quasi-municipal corporation" that may "sue or be sued" under the statute that created it is not relevant to the question of whether or not it may be subjected to punitive damages under a federal statute. (Pl.'s Br. Resp. to Stevens at 4).

A. Program Fraud Civil Remedies Act

Plaintiff also asserts that, unlike states, counties are "persons" for purposes of the Program Fraud Civil Remedies Act of 1986 (PFCRA) and should be afforded similar treatment under the FCA. (Pl.'s Br. Resp. to Stevens at 23). Plaintiff's reasoning is based on the Stevens Court's assertion that as states were not specifically mentioned in the

definition of "person" for purposes of the weaker penalties under the PFCRA it would be illogical to count them persons under the harsher sanctions of the FCA. Plaintiff asserts that Delaware County is defined as a "person" under the PFCRA because it is a "corporate" entity under local law and "corporations" are included as "persons" under the PFCRA. Therefore, plaintiff maintains, Delaware County is a "person" under the FCA. (Pl.'s Br. Resp. to Stevens at 23). I disagree. The penalties under the PFCRA are a civil penalty of not more than $ 5000 for each claim and an assessment in lieu of damages sustained by the United States of not more than twice the amount of the claim. 31 U.S.C. § 3802(a)(1)(D). In determining that the enhanced damage provision rendered the FCA punitive in nature, the Stevens Court distinguished it from an earlier version that imposed only double damages and a civil penalty of $ 2000. See Stevens, 120 S. Ct. at 1869. Therefore, even if plaintiff's interpretation of the definition of the word "corporation" is correct and Delaware County falls within the purview of the PFCRA - a question I do not decide - this does nothing to help plaintiff overcome the County's immunity from the mandatory punitive damage measures of the FCA.

B. Surcharge

One of the reasons the Newport Court found punitive damages impermissible against municipalities was because such awards would burden the taxpayers and citizens for whose benefit

the wrongdoer was being punished. Newport, 453 U.S. at 263. Plaintiff maintains that the rationale behind this rule is inapplicable in this case because there is a state surcharge action that may be brought against individuals to recover funds improperly held by county officials. (Pl.'s Br. Resp. to Stevens at 14, citing 16 Pa. Cons. Stat. § 4901). While it is far from clear whether the $ 4,350,000 in treble damages plaintiff is seeking in addition to the return of over $ 16 million he alleges the County must turn over to the government may be recovered in this fashion, I need not decide this issue.[15] I will not engage in an analysis of possible state law remedies that under certain circumstances might alleviate the cost to local taxpayers of a successful treble damages suit against the County. As the Stevens Court stated, a "better reading of Newport is that [the Supreme Court was] concerned with imposing punitive damages on taxpayers under any circumstances." Stevens, 120 S. Ct. at 1869, n.15.

II. Punitive Damage Liability is Not Separable from a Cause of Action Under the FCA

The amendments to the FCA in 1986 increased liability from double to triple damages, raised the

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15. It is worth noting, however, that § 4901 only empowers a county controller to recover the amount of money that was misused or misappropriated. There is nothing to indicate it would provide any relief in recovering the excess damages levied against the County in the form of treble damages and fines available under the FCA.

civil penalty limit by five times, and added section 3730(d)(5) allowing successful claimants to be awarded attorney's fees in addition to any other percentage of the award recovered. These were the changes that led Justice Scalia to label the damages mandated by the FCA as "essentially punitive in nature."[16] Relying on City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978), and Community Communications Co v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982), both the plaintiff and the government maintain that since under other statutes the Supreme Court has allowed suits against state subdivisions where treble damages were available it would be illogical not to do so under the FCA. (Govt's Br. Resp. to Stevens at 13; Pl.'s Resp. Br. to Govt.'s Resp. to Stevens at 2). In Lafayette and Boulder the Court held that cities were not automatically exempt from the operation of federal antitrust laws. The Court also held that a municipal body was a "person" within the contemplation of those laws despite the presence of a clause calling for treble damages liability for "persons" violating the law. However, in neither Lafayette nor Boulder did the Court reach the question of whether a municipality could be

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16. Any doubt as to whether the 1986 amendments to the FCA apply to this case was resolved by the Court of Appeals when it applied the amended FCA to determine that Dunleavy's claim was not barred by the Act's public disclosure bar, 31 U.S.C. § 3730(d). See 123 F.3d at 739-40.

held liable for treble damages.[17] Further, as the government itself points out, in the wake of the Court's decisions in these two cases, Congress enacted the Local Government Antitrust Act of 1984 ("LGAA"), codified at 15 U.S.C. § § 34-36. This statute, "described by Congress as an act to 'clarify' the application of the Clayton Act to the official conduct of local governments...", prohibited the recovery of antitrust damages from any local government, or any employee or official thereof acting in an official capacity. Opdyke Investment Co. v. City of Detroit, 883 F.2d 1265 (6th Cir. 1989) (precluding recovery of antitrust damages under 15 U.S.C. § 35(a) from the city of Detroit). Using the federal antitrust statutes as a model, as Dunleavy and the government suggest, supports rather than weakens the County's position that it is not subject to suit by private qui tam relators under the FCA.

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17. "It has not been regarded as anomalous to require compliance by municipalities with the substantive standards of ... federal laws which impose [criminal and civil] sanctions upon 'persons.' (Citations omitted) But [this does] not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any question of remedies in this case." Lafayette, 435 U.S. at 401-402 (1978). "Among the many problems [with the majority's decision] will be whether the 'per se' rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants. Another is the question of remedies. The Court understandably leaves open the question whether municipalities may be liable for treble damages for enacting anticompetitive ordinances...." Boulder, 455 U.S. at 65 (Rehnquist, J., dissenting).

A. A Lesser Damage Provision May Not be Imposed

Dunleavy maintains that even if Delaware County is immune from the FCA's treble damage provision this does not extinguish his cause of action but merely changes the remedy available to him. (Pl.'s Br. Resp. to Stevens at 18). This assertion is grounded in the notion that I "may mold or reduce the allowable damages." (Pl.'s Br. Resp. to Stevens at 19). I disagree. Section 3729(a) of the FCA specifically mandates the award of treble damages except in certain specific instances. The Stevens Court labeled this provision as punitive; therefore the only way to overcome the common law doctrine barring punitive damages against state subdivisions would be to allow suits under the FCA to go forward with some lesser form of damages to be imposed. However, since the FCA expressly provides a specific level of liability for violations of its provisions, adoption of this position would require me to rewrite the Act, an action clearly beyond my power. As Justice Scalia points out in Stevens, under the FCA treble damages may be reduced only in specific enumerated circumstances involving defendants who provide information concerning the violation before they know of any investigation. Stevens, 120 S. Ct. at 1870, n.16. (referring to 31 U.S.C. § 3729(a)(A-C)). Dunleavy's claim does not involve such a situation.

I do not agree, however, with defendant's assertion that the doctrine of remittitur may never

be used by a district court to reduce a damage award under the FCA. (Def.'s Br. Resp. to Stevens at 12). Under federal law, a district court may review damages for excessiveness and through remittitur restore the verdict to acceptable limits. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., 1998 U.S. Dist. LEXIS 16080, No. CIV. A. 95-1376, at *15 1998 WL 721081 (E.D. Pa. Oct. 14, 1998). This is no less true under the FCA than in any other area of the law. This doctrine does not assist plaintiff, however, because while a remittitur may be used to reduce an unjustified damage award it has not to my knowledge been used to evade a statutory mandate to triple whatever damages are found to have been sustained. Under the FCA, if the government's losses have been overstated they may be reduced under the doctrine of remittitur to the correct amount. Once determined however, these damages must be tripled unless the defendant falls into the narrow class of defendants entitled to reduced penalties. See 31 U.S.C. § 3729(a)(A-C). It is this tripling of damages that Justice Scalia found punitive in Stevens, and which precludes private actions against local governments under the FCA. [18]

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18. Plaintiff's common law claims of fraud, unjust enrichment, payments under mistake of fact, and breach of contract will also be dismissed. As I will dismiss plaintiff's federal claims under the FCA, I decline to exercise supplemental jurisdiction over the remaining state law claims. See 28 U.S.C. § 1367(c)(3). Further, as the Stevens Court stated, the FCA's unique history and construction provides standing for plaintiffs to sue on behalf of the federal government. Stevens, 120 S. Ct. at 1865. There is nothing before me to show how plaintiff would acquire similar standing

B. Claims Against Individual Defendants

In addition to the suit against Delaware County, there remain the claims against Thomas Killion, in his official capacity as current Chairman of the Delaware County Council; Edwin Erickson, Ph.D., in his official capacity as current County Executive Director; and Matthew J. Hayes, Jr., substituted for the deceased Matthew J. Hayes who was Executive Director of Delaware County during the period of alleged FCA violations. None of the briefs submitted in response to my Order dated May 23, 2000, discussed the viability of any of these remaining claims with the exception of plaintiff's, who noted in the "Factual and Procedural Background" section of his brief that defendant Hayes "sued in his individual capacity, cannot and has not claimed the immunities sought by County and County Council." (Pl.'s Br. Resp. to Stevens at 4). However the viability of plaintiff's claim against Hayes in his private capacity was briefed by the parties in connection with defendant's motion to dismiss, filed September 10, 1999, and denied as moot by my May 23, 2000, Order. I have considered those briefs in reaching my conclusion regarding the claims against Hayes.

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to pursue these state law claims on behalf of the United States.

A suit against an individual in his official capacity is "in all respects other than name, to be treated as a suit against the [government] entity." Kentucky v. Graham, 473 U.S. 159, 166, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). Therefore a plaintiff seeking damages against a government employee in his official capacity must look to the government entity itself for recovery. See id. As I have determined that Delaware County may not be sued by plaintiff under the FCA, the claims against Thomas Killion, Edwin Erickson, and Matthew J. Hayes in his official capacity will be dismissed.

Plaintiff maintains that Hayes is liable in his individual capacity. However, there is nothing in plaintiff's Second Amended Complaint to suggest that Hayes is sued in anything other than his official capacity. Hayes is described as "at all relevant times, the Executive Director of defendant County..., at all relevant times an agent and/or servant and/or employee of Defendant County," who served as a consultant to the County giving advice related to financial planning, investments and other related matters. (Pl. Sec. Am. Comp. P 8). The complaint also alleges that the County acted through Hayes. (Pl. Sec. Am. Comp. PP 21, 23). While plaintiff avers that Hayes had detailed knowledge of many of the transactions at issue (Pl. Sec. Am. Comp. PP 20-26), plaintiff does not allege that Hayes acted for his own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than his official one. I hold that plaintiff's Second

Amended Complaint does not state a claim against Hayes in his private capacity.

An appropriate Order follows.

ORDER

AND NOW, this 12th day of October, 2000, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that plaintiff's Second Amended Complaint is DISMISSED.

THOMAS N. O'NEILL, JR., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3691

USA, ex rel

vs.

County of Delaware _____

SUR PETITION FOR REHEARING

SLOVITER, MANSMANN, SCIRICA,
NYGAARD, ALITO, ROTH, MCKEE,
BARRY, AMBRO and FUENTES, Circuit Judges

The petition for rehearing for filing by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,
/s/ Carol Los Mansmann
Circuit Judge

Dated: February 22, 2002
tyw/cc: Regina D. Poserina, Esq.
Douglas N. Letter, Esq.
Francis X. Crowlet, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3691

UNITED STATES OF AMERICA, EX. REL.
ANTHONY J. DUNLEAVY

vs.

COUNTY OF DELAWARE, MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIRMAN; MATTHEW J. HAYES, JR. AS ADMINISTRATOR OF THE ESTATE OF MATTHEW J. HAYES

Anthony J. Dunleavy,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 94-cv-07000)
District Judge: Honorable Thomas N. O'Neill, Jr.

Before: MANSMANN, ROTH and FUENTES,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on December 7, 2001.

On consideration whereof, it is now here ordered and adjudged by this court that the Order of the District Court entered on October 13, 2000, be and the same is hereby affirmed. All in accordance with the opinion of this Court.

Costs taxed against appellant.

ATTEST:

/s/Marcia M. Waldon
Clerk

Dated: January 29, 2002

'UNITED STATES CODE ANNOTATED
TITLE 31. MONEY AND FINANCE
SUBTITLE III--FINANCIAL MANAGEMENT
CHAPTER 37--CLAIMS
SUBCHAPTER III--CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Current through P.L. 103-354, approved 10-13-94

SEC. 3729. FALSE CLAIMS

(a) Liability for certain acts.--Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the

Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.--For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

SEC. 3730. CIVIL ACTIONS FOR FALSE CLAIMS

(a) Responsibilities of the attorney general.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both

the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions.--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court

may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person

proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would

have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff.--(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate,

but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the

violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.--(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of

the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the

action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses.--The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an

action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

SEC. 3731. FALSE CLAIMS PROCEDURE

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with

responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

SEC. 3732. FALSE CLAIMS JURISDICTION

(a) Actions under section 3730.--Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be

found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

SEC. 3733. CIVIL INVESTIGATIVE DEMANDS

(a) In general.--

(1) Issuance and service.--Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.--

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation

of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for

oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information.--

(1) In general.--A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is

appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws.--Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.--

(1) By whom served.--Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.--Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal

Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.--

(1) Legal entities.--Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.--Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service.--A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed

under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.--

(1) Sworn certificates.--The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials.--Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories.--Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.--

(1) Procedures.--The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed.

When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.--The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken.--The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony.--When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian.--The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law

investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.--Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.--(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise

object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.--Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.--

(1) Designation.--The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law

investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.--(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to

interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.--Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency

through introduction into the record of such case or proceeding.

(4) Conditions for return of material.--If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B) which has not passed into the control of any court, grand jury, or

agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.--In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly–

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held

responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.--

(1) Petition for enforcement.--Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.--(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought

only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.--(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the

provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.--At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction.--Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of

this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.--The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption.--Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions.--For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim

against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials

necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

Supreme Court, U.S.
FILED

JUN 21 2002

OFFICE OF THE CLERK

No. 01-1711

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. ANTHONY J. DUNLEAVY,

Petitioner,

v.

THE COUNTY OF DELAWARE, MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIR; MATTHEW HAYES, JR., ADMINISTRATOR FOR THE ESTATE OF MATTHEW J. HAYES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Third Circuit correctly apply well-established principles set forth by this Court in holding that counties and other local governmental entities are not liable in suits brought by relators under the False Claims Act because of the longstanding presumption that local governmental entities are immune from punitive damages except where Congress has clearly expressed its intention to abrogate that immunity?

II. Did the Third Circuit correctly affirm the District Court's dismissal of Matthew J. Hayes as an individual defendant where the District Court found that there was nothing in Plaintiff's Second Amended Complaint to suggest that Hayes was sued in anything other than his official capacity?

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COUNTERSTATEMENT OF THE CASE

Despite Petitioner's attempts to exaggerate the importance of this case, the proceedings below merely represent the well-reasoned application by the Court of Appeals for the Third Circuit of long-established precedent of this Court to a rather unique set of facts. Following the holdings of this Court in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court of Appeals concluded that Delaware County, Pennsylvania ("the County") could not be liable in a suit brought by a relator under the False Claims Act because Congress did not manifest an intent to overcome the common law immunity of municipalities from punitive damages. Additionally, the Third Circuit affirmed the District Court's decision that Matthew J. Hayes, deceased former Executive Director of the County, could not be liable because the Plaintiff's Complaint failed to set forth any claim against him in his individual capacity.

Petitioner seriously misstates the rationale of the Third Circuit's decision in framing the Question Presented as whether a municipal corporation is included within the definition of the term "person" under the False Claims Act, 31 U.S.C. §3729 (a). In concluding that the False Claims Act is not applicable to the County, the Third Circuit did not base its holding on the definition (or the absence of a definition) of "person"; rather it concluded that the punitive nature of the False Claims Act could not be squared with the common law immunity that protects local governments from punitive damages:

> [T]he mandatory treble damages scheme imposed by the FCA is punitive and that local governments are exempt from FCA damages because congress did not clearly express its intention under the Act to abrogate local governmental common law immunity against punitive damages. (A-16)[1]

Petitioner correctly notes that the facts generally were not determinative of the Third Circuit's holding and are not germane to this Petition. However, Petitioner's statement of facts, in many instances, does not accurately reflect the record below. Given the marginal relevance of these errors, Respondent will dispense with exhaustively cataloging the errors of fact in the Petition's Statement of the Case.[2]

A. Proceedings Below.

Petitioner ignores one crucial aspect of the proceedings below. With regard to the claims against Mr. Hayes, the District Court found that the Complaint failed to state a claim against Mr. Hayes in his individual capacity because there was no substantive allegation that he acted outside his official capacity.

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1. Citations to the Petition for Certiorari are designated as "(Pet. -__)"; citations to the Appendix attached to the Petition for Certiorari are designated as "(A-___)".

2. By way of example only, at Pet.-3, n.2, Petitioner refers to an "uncontroverted expert report" stating that the County should have retained (for subsequent repayment to the Government) over $5,000,000 but only retained approximately $2,000,000. This statement inexplicably ignores the fact that Delaware County submitted an expert report demonstrating that the County repaid the Government within $315.00 of the appropriate amount. Additionally, Petitioner ignores the voluminous evidence of record that the County, in its actions concerning the Penza Tract fund, acted in accordance with and under the guidance of his professional advice. Furthermore, Petitioner takes serious liberty with his descriptions and characterizations of the actions of Mr. Hayes, which are not supported by evidence in the record.

ARGUMENT
REASONS FOR DENYING THE WRIT

I. Although There Is A "Split" In The Circuits, The Decision Below Is In Accordance With The Trend of Decisions, And The Lone Contrary Circuit Decision Is An Aberration.

In an attempt to induce review, Petitioner exaggerates the significance of the "split of authority." Although the Act was passed 139 years ago, only three of the twelve circuits squarely have addressed the Act's application to local governmental entities, all within the last fifteen months. To the extent a "split" exists, it is less than six months old. Two circuits (the Third and the Fifth) have held that because the False Claims Act is punitive in nature and because Congress did not manifest an intent to abrogate municipalities' common law immunity to punitive damages, municipalities are immune from liability in suits brought by relators under the False Claims Act.

Petitioner asserts that the Third Circuit ruling in this case perpetuates a sharp conflict with the Seventh Circuit's ruling in *United States ex rel. Chandler v. Cook County*, 28 F. 3d 969 (7th Cir. 2002). Below the level of the result, that is not the case. *Chandler* held that municipalities were "persons" under the False Claims Act. The Third Circuit's rationale did not turn on the issue of whether the term "person" includes municipalities. Rather, the Third Circuit based its decision in this case on this Court's holding in *Stevens* that the damages imposed under the Act are punitive in nature, coupled with the holding of *Newport* that a municipality's common law presumption of immunity shielded a municipality from the imposition of punitive damages unless Congress clearly manifested its intent to abrogate that immunity. While *Chandler* focused on the definition of "person", the Third Circuit based its rationale on the inconsistency of a punitive statute that would impose treble damages on a municipal entity without a clear indication from Congress that that is what it intended.

The Seventh Circuit is the only Court of Appeals addressing this issue to have overlooked the importance of the punitive nature of the False Claims Act and to conclude that local governmental entities are "persons" under the False Claims Act. The first circuit court decision to address this issue was *United States ex rel. Garibaldi v. Orleans Parish School Board,* 244 F. 3d 486 (5th Cir. 2001), *cert. denied,* 122 S. Ct. 808, *rehearing denied,* 122 S. Ct. 1198 (2002)[3] in which the Fifth Circuit held that a school board, as a local government unit, is not subject to False Claims Act liability in suits by relators. The Fifth Circuit held that municipalities are not "persons" under the False Claims Act because there was no clear indication that Congress intended to impose the False Claim Act's punitive sanctions upon local governmental entities. The Fifth Circuit rejected Relator's argument that the Dictionary Act requires the definition of "person" to include local governments and held that, by its own terms, the Dictionary Act's definitions do not apply when the context of a statute indicates that Congress "intends" another meaning. *Id.* at 492, *citing, Rowland v. California Men's Colony Unit II Men's Advisory Council,* 506 U.S. 194 (1993). The Fifth Circuit determined that, even if it were clear that "the definition of 'person' in the Dictionary Act included local governments, the punitive damages regime of the False Claims Act 'indicates' a congressional intent that local governments not be subject to liability under the False Claims Act." *Id* at. 492. (Emphasis added).

Similarly, although it did not directly address the question of municipal liability under the False Claims Act, the Ninth Circuit held that the Act's civil fines provision

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3. Certiorari originally was denied on January 7, 2002, before the decisions by the Third and Seventh Circuits in *Dunleavy* and *Chandler.* However, after *Chandler* was issued, the Relators in *Garibaldi* filed a petition requesting rehearing on the basis that *Chandler* created a split in the Circuits. This Court denied the Relator's Petition for rehearing on February 25, 2002, several weeks after the issuance of the decisions in *Dunleavy* and *Chandler.*

"clearly has a punitive purpose" and that the treble damage scheme likewise is at least partially punitive. *United States v. Mackby*, 261 F.3d 821, 830-31 (9th Cir. 2001) (remanding case for an excessive fines clause analysis of both the civil fines and treble damages, under the Eighth Amendment).[4] *Id.*

The small number of circuits that have addressed the applicability of the False Claims Act generally have reached the same result for the same reason — immunity — except for the one circuit, the Seventh, which recently reached a different result on a distinct rationale — the statutory interpretation of the term "person". The possibility or

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4. The majority of District Courts addressing this issue likewise have concluded that, because of the punitive nature of the False Claims Act, municipalities are not subject to suits under that statute. *See United States ex rel. Wilson v. Graham County Soil and Water Conservation District*, 2002 WL 487162 (W.D. N.C. March 25, 2002); *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. Aug. 31, 2001); *United States ex rel. Honeywell v. San Francisco Housing Authority* 2001 WL 793300 (N.D.Cal. July 12, 2001); *United States ex. rel. Kinney v. Hennepin County Medical Center*, 2001 WL 930780 (D. MN. Jan. 22, 2001); *United States v. Hickman County*, no. 1:97-0086 (M.D. Tenn. March 29, 2001); *United States ex. rel. King v. Jackson County Hospital Corp.*, 2001 U.S. Dist. Lexis 21706 (N.D.Fla. Aug. 17, 2001); *United States ex. rel. Graber v City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998); *United States ex rel. Chandler v. Cook County*, 118 F. Supp.2d 902 (N.D. Ill. 2000), *reversed*, 28 F. 3d 969 (7th Cir. 2001).

Only a few of District Courts have disregarded the punitive nature of the Act and held municipalities liable. *See United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. Lexis 2021068 (C.D.Cal. July 27, 2000); *United States ex. rel. Rosales v. San Francisco Housing Authority*, 173 F. Supp.2d 987 (N.D. Cal. 2001); *United States ex rel. K & R Ltd. Partnership v. Massachusetts Housing Finance Co.*, 154 F.Supp. 2d 19 (D.D.C. 2001).

The determination by the Ninth Circuit Court of Appeals in *Mackby*, that the False Claims Act has a punitive purpose, should resolve the dichotomy in the District Courts of the Ninth Circuit, as the Ninth Circuit will necessarily begin from the proposition that the False Claims Act is at least partially punitive. Of the four cases in the Northern and Central Districts of California, both cases holding that municipalities could be liable under the False Claims Act (the *Rosales* and *Giles* cases) were decided before *Mackby*.

likelihood remains that, in light of the unanimity of the other circuits, the Seventh Circuit in future cases would reconsider the immunity aspect and reevaluate its contrary result.

II. The Decision Below Does Not Threaten the Government's Ability to Protect the Treasury.

The alleged "conflict" in the lower courts does not threaten the Government's ability to protect the United States Treasury from frauds wrought by local governmental entities. First, it is significant that, as Petitioner acknowledges, the United States, having been provided the opportunity, declined to intervene concluding that no fraud had been committed. (Pet. - 4). Second, the Government has many other means to protect the public treasury from fraud by local governments that do not include the *in terrorem* threat of punitive damages. The most obvious of these are the audit commonly performed by the Government and include a wide array of remedies and sanctions. *See, e.g.,* 24 C.F.R. §85.42 (requiring grant recipients to provide access to the Comptroller General and HUD representatives, such as the Inspector General, to conduct audits and examinations); §§570.900-906 (requiring HUD to conduct reviews of grantee performance on an annual or more frequent basis); §§570.910-913 (governing the sanctions available to HUD to remedy grantee non-compliance).[5] Indeed, in this case, the Government performed an audit and, in response, the County did repay $1,921,699 to the Government, which payment the federal government then returned to the County for use in its Community Development Block Grant Program.

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5. Section 85.42 relates generally to "Federal grants and cooperative agreements and subawards to state, local and Indian tribal governments." 24 C.F.R. §85.1. Sections 570.900-913 relate specifically to the grantee under the Community Development Block Grant program. However, similar provisions can be found in the regulations governing many other grant programs.

In addition to audits accompanied by statutory or regulatory remedies, the Government may employ the full panoply of common law remedies, such as actions for breach of contract, and fraud, to obtain compensation for improper acts by municipalities or their officials. The False Claims Act clearly is not the only, or even the most effective, weapon in the Government's arsenal to combat potential fraud by local governments.

III. Review Would Be Premature Here Since Cases Are Pending Before Two Circuits Which Will Allow the Court of Appeals to Further Define the Issue.

Review at this time would be premature not only because the circuits have not yet arrived at a single analytical approach to the Act's applicability to local governmental entities but also because not all of the circuits have yet had the opportunity to address this issue and several cases raising this issue are pending. At least two other Courts of Appeals, the Eleventh and the District of Columbia Circuits, will soon have the opportunity to address the issue of municipal immunity from liability under the False Claims Act. *See United States ex rel. King v. Jackson County Hospital Corp.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001), *appeal pending*, No. 02-11471-A (11th Cir.); *United States ex rel. K&R Limited Partnership v. Massachusetts Housing Finance Agency*, 154 F.Supp. 2d 19 (D.D.C. 2001), *appeal pending*, No. 02-5043 (D.C. Cir). Thus, in the near future, at least two more Courts of Appeal will have the opportunity to consider the decisions of the Third, Fifth and Seventh Circuits and confirm that, since this Supreme Court already has found the False Claims Act to be punitive in nature, and because Congress failed to manifest a clear intent to pierce municipal common law immunity from punitive damages, the Third and Fifth Circuits are correct on the ground of immunity. This, therefore, is a classic case in which premature review is to be avoided. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*

(7th ed. 1993) at 171, *quoting* Justice Stevens, *Some Thoughts on Judicial Restraint,* 66 Judicature 177, 183 (1982) ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.")

Additionally, the novelty and recent emergence of this issue in the False Claims Act context weighs in favor of judicial restraint at this time. The False Claims Act initially was enacted in 1863. It was not until four years ago, in 1998, that the issue of whether a municipality was liable under the Act first was addressed by any court. *See United States ex rel. Graber, supra.* It was not until March, 2001 that any Circuit Court issued an opinion on the issue. *See United States ex rel. Garibaldi, supra. Chandler* was issued in January, 2002. The "split" — if there is one — is less than six months old.

IV. The Third Circuit's Decision Was Correct.

The Third Circuit's decision below represents the correct and well-reasoned application of this Court's prior decisions in *Stevens* and *Newport.* Thus, there is no need to grant review here.

A. This Court has held that the mandatory treble damages imposed by the False Claims Act are punitive and that there is a longstanding presumption against holding municipalities liable for such damages.

This Court in *Stevens* decided that a relator cannot bring suit against a state or state agency under the False Claims Act. Beginning with a review of the historical context of the Act, the Court acknowledged that the Act ". . . was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the civil war'" and noted that the statute's original did not even make clear that private corporations were covered, let alone States. *Stevens,* 529 U.S. at 781, *citing, United States v. Bornstein,* 423 U.S. 303, 309 (1976)

(*bracketed materials in Stevens*). This Court stated that the term "person" in the statute has remained materially unchanged since 1863; thus any analysis as to Congress' intent necessarily leads back to the 1863 Congress. *Id.*, 529 U.S. at 782 n.12.

In *Stevens*, the Court reiterated the presumption that the term "person" does not include states, which can be rebutted only by clear evidence of Congress' intent to do so. Although the same presumption does not apply to municipalities, the Court identified several other important factors supporting its conclusion that states are not subject to *qui tam* liability, which factors do apply to local governmental agencies. Most relevant to this Petition, the Court recognized the punitive nature of the Act's damages:

> [T]he current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state qui tam liability in light of the presumption against imposition of punitive damages on governmental entities. *See e.g., Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981).

Stevens, 529 U.S. at 784-785. In support of its decision, this Court specifically relied upon the seminal case establishing that political subdivisions are immune from punitive damages. This Court went on to state that: "[t]he very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Stevens*, 529 U.S. at 786, *quoting, Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).[6]

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6. The Court held that its conclusion that states are not "persons" also was buttressed by the facts that: (a) the civil investigative demand provisions of the Act, 31 U.S.C. §3733(a)(1), specifically defines "person" to include states and political subdivisions for that limited purpose; and (b) the Program Fraud Civil Remedies Act, 31 U.S.C. §3801 *et seq.* explicitly excluded states and political subdivisions from its liability provisions. *Stevens*, generally. These same factors establish that Congress likewise did not intend to vitiate the common law immunity from punitive liability that protects municipalities.

Petitioner attempts to distinguish the False Claims Act punitive damages from those at issue in *Newport* by arguing that "under the FCA there is no diversion of public money to an individual private plaintiff in the form of damages . . ." (Pet.-17). Petitioner blatantly ignores the fact that a relator, in cases in which the Government does not intervene (such as this case), receives 25% to 30% of the total proceeds, which "shall be paid out of such proceeds." 31 U.S.C. §3730(d)(2). Thus, an amount almost equal to the Government's actual damages (before trebling) would be paid from local governments tax revenues to private persons — relators; this does not include the relator's attorneys' fees which must be paid, again, from local government funds. *Id.*

This Court's decision in *Stevens* leaves no doubt that the Act is punitive, despite Petitioner's contrived arguments. *Stevens* accurately reflects the legislative intent behind the original False Claims Act and the 1986 Amendments, as well as well-established judicial precedent. The False Claims Act was enacted in 1863 during the Civil War, to address widespread and blatant fraud by private military contractors, who had been billing the United States for nonexistent or worthless goods, charging exorbitant prices for goods, and generally plundering the public treasury. *See United States v. McNinch,* 356 U.S. 595, 599 (1958). Its purpose was not merely to compensate the federal government; rather its "stringent provisions are required for the purpose of punishing and preventing these frauds." *McNinch,* 356 U.S. at 600, *quoting Cong. Globe, 37th Cong.,* 3d Sess. 952 (1863).[7] *See also* Kenneth Mann,

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7. Petitioner cites *U.S. v. Bornstein,* 423 U.S. 303 (1976), at footnote 16 of its Petition for the proposition that the FCA was remedial rather than punitive; however, that case was decided before the Act was amended to provide for treble damages and a civil penalty of up to $10,000 per claim. Indeed, given this Legislative history and Congressional intent to punish wrongdoers, the False Claims Act, with double damages and civil penalties of $2,000.00 per violation, arguably was punitive in nature even before the 1986 Amendments, which have clearly been found by *Stevens* to be punitive. Moreover, this Court in *Bornstein* specifically

Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L. J. 1795, 1855, 1861 (June 1992)(intent of False Claims Act to punish wrongdoers). Congressman Fish, a sponsor of the 1986 amendments, acknowledged that the purpose of the unamended Act's double damages recovery, and civil fines, were intended to be a "substantial penalty" to "forcefully discourage individuals and companies . . . from engaging in fraudulent practices" and that the "dual purpose of any such law should always be to deter as well as punish fraudulent conduct." 132 Cong. Rec. 22336, 22337 (1986).

The 1986 amendments to the Act enhanced the punitive nature of the statute's remedies by establishing the current treble damages, increasing fines from $2,000 to $5,000-$10,000 per false claim and requiring defendants to pay relators' attorneys' fees. Making this change, "Congress understood very well that it was instituting new 'punitive sanctions.'" Mann, 101 YALE L.J. at 1860.

Prior to the passage of the 1986 Amendments, the Department of Justice warned Congress that treble damages and increased penalties would render the False Claims Act more likely to be considered punitive. *See* Michael L. Colis, *Settling For Less: The Department of Justice's Command Performance under the 1986 False Claims Amendments Act,* 7 Admin. L. J. Am. U. 409 (Summer 1993), *citing,* False Claims Reform Act: Hearings on S. 1562 Before the Subcommittee in Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 2 (1985) (statement of Jay B. Stephens, Deputy Associate Attorney General, U.S. Department of Justice) 132 Cong. Rec. 22336, 22337 (1986). Cognizant of this warning, Congress increased penalties precisely to accommodate the perceived need to increase the Act's deterrent

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acknowledged that "[a]ccording to its sponsor, the False Claims Act was adopted "for the purpose of punishing and preventing . . . frauds." *Id.*, 423 U.S. at 309 n.5, *citing, Cong. Globe, 37th Cong. 3d Sess.*, 952 (remarks of Sen. Howard), 955 (remarks of Sen. Wilson).

effect. *See* statements of Rep. Glickman and Rep. Brooks, 132 Cong. Rec. 22335, 22336 (1986).

The civil penalties imposed by the Act likewise are punitive. *See e.g. United States Department of Energy v. Ohio,* 503 U.S. 607 (1992) (civil penalties under the Clean Water Act and the Resource Conversation and Recovery Act of 1976 were intended to be punitive); *Tull v. United States,* 481 U.S. 412, 422 n. 7 (1987) ("the remedy of civil penalties is similar to remedy of punitive damages").

B. The Third Circuit correctly applied the holdings of *Stevens* and *City of Newport* in resolving the issues presented in this case.

The Third Circuit began its own analysis in this case by citing *City of Newport* for the well-settled presumption that "[u]nless Congress clearly provides otherwise, a local governmental entity is immune from punitive damages awards". (A-7). Because *Stevens* definitively and affirmatively answered the "threshold question" of "whether the damages imposed by the Act are punitive," the Third Circuit next focused on whether Congress expressed a clear indication that it intended to abrogate local governmental immunity under the False Claims Act. (A 9-10). After careful consideration, the Third Circuit found no evidence of any congressional intent to abrogate that well settled common law immunity either in the statute itself or in the legislative history; thus, holding that Congress did not intend to disturb local governmental immunity from punitive damages by clearly including local governments within the meaning of the term "person", and that the County is immune from claims under the False Claims Act due to the mandatory nature of the treble damages provision. (A-15).

Congress is aware of this immunity and can take action, if it so chooses, to abrogate this presumption. The Third Circuit found no evidence that Congress had taken any action to authorize the imposition of these punitive damages

against municipalities under the Act. There is nothing in the statute itself that indicates that Congress intended abrogate it. Unlike numerous other statutes,[8] the liability provisions of the False Claims Act do not define the term "persons" to include counties, municipalities or other political subdivisions; indeed, it does not define the term "person" in any way. *Newport* teaches that general language within a statute does not overcome the longstanding and well-established presumption against imposing punitive sanctions upon counties and other municipal entities.

Petitioner attempts to obscure this issue by arguing that the common law immunity from punitive damages does not shield the County or other municipalities because Congress used the term "person" without definition in the statute and because, Petitioner argues, it was "thoroughly established" that Congress intended the term "person" to include municipal corporations at the time when the FCA was adopted." (Pet. - 11.) This argument fails for two reasons. First, the Civil Rights Act, like the False Claims Act, uses the term "person" without definition. Yet, this Court in *City of Newport* explicitly held that Congress did not intend to impose punitive damages upon municipalities under the Civil Rights Act. Therefore, the mere use of the

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8. *See, e.g.*, the Clean Water Act, 33 U.S.C. §1362(5)("person" defined to include ". . . State, municipality, commission or political subdivision of a State . . ."); Resource Conservation and Recovery Act, 42 U.S.C. §6903(15) (defining "person" to include ". . . corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body"). *See also* the following statutes which incorporate the terms "municipality", "government" or "political subdivision" in specific definitions of "person": 15 U.S.C. §1691(f); 15 U.S.C. §3002(i); 15 U.S.C. §3301(26); 33 U.S.C. §2001(i); 16 U.S.C. §4903(4); 42 U.S.C. §2000e(a); 42 U.S.C. §2014(5); 42 U.S.C. §7602(e); 42 U.S.C. §300f(12); 33 U.S.C. §1901(a); 33 U.S.C. §2701(27); 50 U.S.C. §167(2). The Civil Investigative Demand section of the False Claims Act itself demonstrates that, when Congress intends to include political subdivisions, it knows how to do so since, for purposes of that section of the Act only, Congress explicitly defined "person" to include political subdivisions. *See* 31 U.S.C. §3733.

term "person" in the False Claims Act likewise does not pierce municipal immunity.

Second, the scope of the term "person" was not well established at the time the False Claims Act was passed. In *Monell v. Department of Social Services,* 436 U.S. 658 (1978), this Court considered whether the members of Congress in 1871 understood the term "person" to include municipal corporations. It observed that by 1844, the Supreme Court had abandoned the principle that corporations were not persons. *Id.* at 688, *citing Louisville Railway Co. v. Letson,* 2 How. 498, 558, 11 L.Ed 353 (1844). However, it was not until 1869 when the Supreme Court extended its holding in *Letson* to municipal corporations. *Id., citing Cowles v. Mercer County,* 7 Wall 118, 121, 19 L.Ed.86 (1869). Thus, the clarification regarding municipal corporations came six years after the False Claims Act was enacted. This analysis, coupled with the fact that the Dictionary Act was not enacted until 1871, shows that the term "person" was not well settled so as to include municipalities in its definition when the False Claims Act was passed in 1863.

Thus, the Third Circuit correctly concluded that Congress did not manifest a clear intent to pierce local governmental immunity through the False Claims Act.

V. The Third Circuit's Affirmance Of The District Court's Decision That Hayes Was Not Liable Individually Under The False Claims Act Was Proper And Is In Accordance With Other Decisions.

Petitioner also challenges the Third Circuit's decision to affirm the District Court's holding that former County Executive Director Matthew J. Hayes was not liable under the False Claims Act as an individual because he did not personally benefit from the transactions constituting violations of the Act. The Third Circuit's ruling on this issue is merely a routine application to the facts and

pleadings of this case of well-established principles of pleading personal capacity.

The Third Circuit properly resolved the issue of Mr. Hayes' individual liability, and there is no need for this Court to review that issue. In the matter *sub judice,* the Third Circuit agreed with the District Court that Hayes was not liable because there was no allegation that Hayes personally benefited from any of the transactions constituting alleged violations of the Act. However, the sum and substance of the District Court's opinion was that there "was nothing in Plaintiff's Second Amended Complaint to suggest that Hayes is sued in anything other than his official capacity." (A-41) . The District Court specifically stated that "while Plaintiff avers that Hayes had detailed knowledge of many of the transactions at issue, Plaintiff does not allege that Hayes acted for his own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than his official one." (A-41). Thus, the District Court held, Dunleavy failed to state a claim upon which relief could be granted against Hayes by failing to even allege facts that could possibly constitute an individual capacity suit against the former Executive Director. In reviewing the District Court's decision on this issue, the Third Circuit agreed and determined that no additional analysis has been necessary to support its determination to affirm the decision.

This Court has ruled that the mere incantation of the term "individual capacity" is insufficient to transform an official capacity action into an individual capacity action. *See e.g., Bender v. Williamsport Area School District,* 475 U.S. 534, 543 (1986). Courts around the country have had no

difficulty in applying this principle of pleading to suits under the False Claims Act and uniformly have adopted the same approach as the Third Circuit.[9]

Petitioner cites only *Hafer v. Melo*, 502 U.S. 21 (1991), a Civil Rights Act case, to support its argument that municipal officers in their individual capacities can be held as proper defendants. However, Petitioner has identified no valid reason why this Court should review the Third Circuit's application of well-established pleading rules to the pleadings in this case. Petitioner can point to no alleged conflict among the Circuits regarding the issue of individual capacity suits under the False Claims Act, and the Third Circuit's decision clearly was correct.

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9. *See United States ex. rel. Gaudineer & Comito, L.L.P. v. State of Iowa*, 269 F. 3d 932 1936 (8th Cir. 2001) (court "should look at whether the alleged conduct of the defendant was outside his official duties" and "not rely wholly on the elementary mechanics of captions and pleadings"); *Bly Magee v. State of California*, 236 F. 3d 1014 (9th Cir. 2001) (former attorney general and other attorneys who worked for the attorney general would be immune under False Claims Act for conduct during the performance of their official duties); *Alexander v. Gilmore*, 2002 WL 970650 (E.D.Va. Apr. 30, 2002), (dismissed because complaint did not allege that defendants there were acting in anything other than their official capacities, and nothing in complaint suggested that the individual defendants converted funds for their personal use); *United States ex rel. Honeywell v. San Francisco Housing Authority*, 2001 WL 793300 (N.D.Cal. July 12, 2001) (False Claims Act claims against governmental officials in their personal capacities must contain allegations of personal gain); *United States ex rel. Kinny v. Stoltz*, 2002 WL 523869 at *7 n. 3, No Civ. 01-1287 (D. Minn. Apr. 5, 2002) (same); *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 2002 WL 487162 at *11, No 2:01 CV 19-R 2002 (WD N.C. Mar. 25, 2002) (same).

CONCLUSION

For the foregoing reasons, Delaware County respectfully requests that the Court deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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(3)

NO. 01-1711

Supreme Court, U.S.
JUN 28 2002
CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex. rel. ANTHONY J. DUNLEAVY,
Petitioner,

v.

THE COUNTY OF DELAWARE, MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIR; MATTHEW HAYES, JR., ADMINISTRATOR FOR THE ESTATE OF MATTHEW J. HAYES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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REPLY TO THE BRIEF IN OPPOSITION

1. Respondents concede that the facts of the FCA claim in this case are irrelevant to the pure issues of law presented here. Brief in Opposition ("Br.Opp.") 2. Respondents thus acknowledge that this case is unblemished by record or procedural problems and is therefore a suitable vehicle for addressing the important questions presented.

2. Respondents concede that the Courts of Appeals are divided on the first Question Presented – whether municipal corporations are "persons" within the meaning of the FCA or are instead wholly immune from claims under the Act. Br.Opp. 3. Respondents further concede that the rift on this important question is widening: three Courts of Appeal have ruled, several more are poised to rule, and there are a dozen district court decisions, with courts going each way. Br.Opp. 5 n.4, 7. All of this activity comes in the wake of this Court's decision two Terms ago in *Vermont Agency v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Several of the Courts of Appeals, including the court below, have misread *Stevens*. These court have made not just sovereign states, but also counties and cities, wholly immune from liability under the FCA. That issue warrants this Court's immediate attention.

3. Respondents urge the Court to delay resolution of this issue on the grounds that stripping the federal government of the remedies of the FCA is no big deal, as there are other means of protecting the United States Treasury from fraud by local governments. Br.Opp. 6. Respondents suggest that the federal government instead make use of audits. Br.Opp. 6. They opine that the FCA

is not an important or particularly "effective" means of redressing fraud on the public fisc. Br.Opp. 7.

Respondents are entitled to their own opinion, but their opinion on this issue is entitled to no weight. Congress has determined precisely the opposite: the FCA is the single most important weapon to combat fraud on the federal government, "intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side.'" S. Rep. No. 345, 99th Cong., 2nd Sess. 11 (1986) (citation omitted). Congress amended the FCA in 1986 to increase recoverable damages from double to treble with the specific purpose "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345 at 1. *See also* H.R. Rep. No. 660, 99th Cong., 2nd Sess. 16 (1986). Furthermore, when Congress strengthened the FCA in 1986, it expressly noted its judgment that this statutory remedy applied to all "persons" who might defraud the Treasury, including "partnerships, associations, and corporations." S. Rep. No. 345 at 8.

Similarly, this Court has noted that "one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n. 5 (1943).

Indeed, this Court has recognized the compelling need to resolve questions about the applicability of the

FCA with alacrity. In *Stevens*, the Court *sua sponte* raised the question of whether *qui tam* actions are permissible under Article III, even though that issue had not been previously litigated in the *Stevens* case itself. The issue had instead arisen in a case then pending in the Fifth Circuit and, rather than await a petition for writ of certiorari in the usual course, this Court added that Article III question about the FCA to the *Stevens* case already on the Court's docket. Similar solicitude is appropriate for the question presented here, which, if unreviewed, threatens the federal government's ability to protect the U.S. Treasury from frauds by cities and counties.

4. The remainder of Respondents' reasons for denying review consist of arguments on the merits. Unable to deny the sharp conflict among the Courts of Appeals, Respondents urge this Court to dismiss the closely reasoned decision of the Seventh Circuit in *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), as an "aberration" that, Respondents hope, will simply go away. Br.Opp. 3. That is hardly a sound policy of appellate review, especially when such an important federal statute is at stake. The United States Treasury and the taxpayers of the United States need the FCA and they need it available in every judicial circuit.

5. Virtually all of Respondents' defenses of the decision below were anticipated in the Petition, so only a few points require discussion here. First, the Petition argued that, in contrast to the Seventh Circuit in *Chandler*, the court below erred by failing to conduct the required statutory inquiry into whom Congress intended

to encompass within the statutory term "persons" in 31 U.S.C. § 3729(a). Petition 10-12. Remarkably, Respondents actually concede that the Third Circuit's decision did not address "the issue of whether the term 'person' includes municipalities." Br.Opp. 3. Since the meaning of the term "person" is the central issue of statutory interpretation that governs application of the FCA to cities and counties, Respondents thus inadvertently concede both the error of the court below and the need for review and reversal by this Court.

Second, Respondents actually contest this Court's own decisions on the meaning of the term "persons" in the FCA.[1] Respondents insist that the "liability provisions of the False Claims Act do not define the term 'persons' to include counties, municipalities or other political subdivisions." Br.Opp. 13. They further contend that "the term 'person' was not well settled so as to include municipalities in its definition when the False Claims Act was passed in 1863." Br. Opp. 14.

This flies in the face of *Stevens* and misrepresents this Court's decisions. *Stevens* explicitly reaffirmed that corporations "are presumptively covered by the term 'person.'" 529 U.S. at 782. *See* Petition 11-12. The Court stressed that nothing "cast[s] doubt upon the courts' assumption that §3729(a) extends to corporations." *Id.* at 782.

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[1]Despite Respondents' assertion to the contrary, Br.Opp. 9 n.6, municipal corporations are "persons" under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.*

When the FCA was enacted in 1863, cities "were treated as natural persons for virtually all purposes of constitutional and statutory analysis. . . . Local government units were regularly held to answer in damages for a wide range of statutory and constitutional violations." *Owen v. City of Independence*, 445 U.S. 622, 639 & n.19 (1980) (citing cases from 1860, *before* FCA was enacted). *See also City of Newport v. Fact Concerts*, 453 U.S. 247, 259 (1981) (citing cases from 1846, 1847, 1858, *before* FCA was enacted).

6. As this Court held in *Stevens*, the presumption that "persons" includes private and public corporations was not changed by the 1986 FCA amendments. 529 U.S. at 782-83 & n.12. In 1986, with the express understanding that the persons liable under the FCA included cities, Congress increased damages from double to treble, and thereby overrode any common-law presumption that cities are not subject to that damages remedy. Petition 19. The only interpretation left for Respondents is that Congress was sleepwalking.

7. Mr. Hayes misstates the holdings on the issue of his personal liability. The district court, citing the lack of allegations that Mr. Hayes personally benefitted from his actions, held that the complaint failed to state a claim against Mr. Hayes in his individual capacity. See A-41-42. The United States Court of Appeals for the Third Circuit noted "in passing" its agreement that "an employee of a local governmental unit is not subject to suit.... when the employee does not personally benefit from the transaction constituting a violation of the Act..." *See* A-4.

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